1867

SUPREME COURT OF THE UNITED STATES.

No. ~~245~~ 137.

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY, COMPLAINANTS AND APPELLANTS,

vs.

SELAH CHAMBERLAIN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

GOVERNMENT PRINTING OFFICE.

1003

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1 Circuit court of the United States of America for the ninth circuit and district of Wisconsin.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America for the ninth circuit and district of Wisconsin, begun and held according to law, on the third Monday (being the eighteenth day) of April, A. D. 1864, at the city of Milwaukee, in said district of Wisconsin, present and presiding the Honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, assigned to said circuit, and the Honorable Andrew G. Miller, district judge, Darius C. Jackson, marshal, and A. Scott Sloan, clerk. On the tenth day of the term, to wit, on the twenty-eighth day of April, A. D. 1864, the following proceedings were had, to wit:

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY, complainants,
vs.
SELAH CHAMBERLAIN, defendant. } In equity.

Be it remembered, that heretofore, to wit, on the twenty-ninth day of
2 June, A. D. 1863, came the said complainant by its solicitor, Matt. H. Carpenter, and filed its bill of complaint against the said defendant, as follows:

Bill of complaint.

District of Wisconsin, in equity.

3 To the judges of the circuit court of the United States for 9th circuit and district of Wisconsin, in equity:

The Milwaukee and Minnesota Railroad Company, a corporation created by and existing under the laws of the State of Wisconsin, brings this its bill of complaint against Selah Chamberlain, of Cleveland, Ohio, a citizen of the State of Ohio.

3*a* And thereupon your orator complains and says that the La Crosse and Milwaukee Company was from the 1st day of January, 1850, until the 21st day of May, A. D. 1860, a corporation existing under the laws of the State of Wisconsin, and that during that time its business affairs were managed by a board of directors; that about the 21st day of June, A. D. 1858, the said company was indebted to a large amount of floating debt, accumulated for rolling stock and materials furnished and provided, and labor performed for said company, which was unsecured upon the railroad or other property of said company; and that a large number of farmers along the line of said company's railroad had before then loaned their credit in form of bonds and mortgages, to aid said company in the construction and equipment of its said railroad; which bonds and mortgages had been before then used by the said company, with a stipulation on its part, with and to said farmers, to pay the interest that might accrue thereon, and that a large sum of said interest, which said company was bound to pay as aforesaid, had become due, and the said company was unable to pay the same, and proceedings were threatened against such farmers to enforce payment of such interest; and that the said company, for the purpose of securing said indebtedness and said interest, and for other legitimate and necessary purposes, did, on or about the day and year last aforesaid, make, sign, seal, execute, and perfect, ready to be negotiated, sold, delivered, and transferred in payment of said indebtedness of said company, and in payment of said interest, and to be used in and about the necessary and proper business of said company, one thousand bonds of one thousand dollars each, and fourteen

hundred bonds of five hundred dollars each, and three thousand bonds of one hundred dollars each, all dated that day and year, and payable in A. D. 1888, with interest at seven per cent., payable semi-anually on the 1st day of January and July in each year, with coupons for said interest to said bonds respectively attached; and that to secure the payment of said bonds, and thereby enable said company to use said bonds for the purposes aforesaid, the said company did, on the said 21st day of June, 1858, make, execute, sign, acknowledge, and perfect its mortgage or deed of trust in due form of law, and as it by law had authority to do, to William Barnes, to secure the payment of said last-named bonds and the interest thereon, in and by which said mortgage or deed of trust said company mortgaged to said Barnes, trustee, for the purposes aforesaid, "All and singular the railroad of said company, commencing in the city of Milwaukee and running from thence to La Crosse, a distance of about two hundred miles, a part of which road had been constructed, and was then in full operation, and the residue was then in process of construction, including all and singular the several tracts, pieces, or parcels of land which then were or thereafter might be, or constitute the site of the roadways, turnouts, engine-houses, workshops, depots, and other buildings, and all the other lands and real estate which then constituted, or might thereafter constitute, or be a part of, or appertain to, said railroad, whether then made or to be made thereafter, and all the engine-houses, workshops, depots, and other buildings, and all the other improvements on or appertaining to said railroad, whether then made or built or to be built and made thereafter; and all and singular the locomotive engines and other rolling stock, and all the other equipments of every kind and description which had then been or might thereafter be procured for or used on said railroad, and all the materials, tools, implements, utensils, and other personal property which had then been or might thereafter be procured for or used in connection with such railroad.

And also all and singular the rights, liberties, privileges, and franchises of said railroad to La Crosse, together with other property and things in said mortgage described; and that about the said 21st day of June, A. D. 1858, said mortgage was by said company duly and legally delivered to said William Barnes, trustee, and was by said trustee thereafter caused to be duly and legally recorded in the office of the secretary of state of the State of Wisconsin, and, as the plaintiff says on information and belief, in the offices of the register of deeds in the several counties through which said railroad passes and was then located.

4 That on the 11th day of August, A. D 1858, the said company made, signed, sealed, and delivered to said Barnes, trustee, a certain indenture of supplemental mortgage or deed of trust, in and by which said company recited and affirmed the terms and conditions of said mortgage or deed of trust hereinbefore set forth, and dated June 21st, 1858, and did convey to said Barnes, as trustee as aforesaid, in addition to the things in said first mortgage conveyed, the following, that is to say: All and singular the rights, privileges, liberties, and franchises of said company of every kind and description; and also all lands granted or intended to be granted to said company, under and by virtue of the act of Congress, and the act of the legislature of the State of Wisconsin, in said supplementary mortgage mentioned, and also all the hereditaments and appurtenances belonging or in anywise appertaining to the lands and real estate therein conveyed or intended to be conveyed; and also all and singular the stock, railroad or other bonds, bills of exchange, promissory notes, accounts, causes of action, demands and choses in action, of whatsoever nature, which might be owned, or in which said company might have an interest on such day as such company might first make default in the payment of the interest or principle or

any part thereof, which might thereafter become due on any of the said bonds issued or to be issued by the said company, and to secure which said mortgage was given. That immediately thereafter the said Barnes caused said supplementary mortgage to be recorded, as in the same offices as the said first-named deed of trust or mortgage to said Barnes was recorded as hereinbefore set forth; a copy of which said first mortgage or deed of trust, and a copy of which said supplementary mortgage or deed of trust to said Barnes, are attached hereto, and marked, respectively, Exhibit No. 1 and Exhibit No. 2.

That immediately thereafter said company commenced to deliver the said last-named bonds, so secured as aforesaid, in payment of the indebtedness of said company, and for the other purposes contemplated by said company in the issue thereof, and in the necessary and proper business of said company, and that all of said bonds were sold, and delivered in payment, and transferred by said company for the purposes and in the manner contemplated as aforesaid by said company, and that large numbers of said bonds were paid and delivered to residents of the State of Wisconsin in payment of the indebtedness of such persons against said company for materials furnished to and services rendered for said company, and that large numbers of said bonds are now leld by such persons in the said State, or nave been by them turned into the stock of the Milwaukee and Minnesota Railroad Company, as hereinafter stated, and that a large number of said bonds have passed into circulation in the bond and stock markets of the United States, particularly in the city of New York, which are now held by bona fide purchasers and owners, or have by them been turned into the stock of the Milwaukee and Minnesota Railroad Company, as hereinafter mentioned. That about the 1st of February, A. D. 1859, the said company having made default in the payment of, or part of, the interest due on said bonds secured as aforesaid, the said William Barnes, in pursuance of the provisions of the laws of the State of Wisconsin then in force in that behalf, and the provisions contained in said mortgages of deeds of trust, proceeded to the foreclosure of said mortgages by advertisement; and having previously given the notice required by law in that behalf, on the 21st of May, A. D. 1859, said William Barnes, trustee, sold at public action, at the court-house in the city and county of Milwaukee, in said State of Wisconsin, all property, rights, privileges, franchises, things in action, and other things in said mortgage and supplementary mortgage to him, said Barnes, described; and the said William Barnes, trustee, then and there at said sale became the purchaser thereof according to the provisions of the laws of said State of Wisconsin, then in force in that behalf, at and for the sum of one million five hundred and ninety-three thousand three hundred and thirty-three dollars and thirty-three cents, ($1,593,333 33;) no other person or body having made any bid, whatever for the same, and that said mortgages thus became and were thereby foreclosed according to the provisions of the laws of the State of Wisconsin in that behalf then in force. And that said Barnes, by virtue of said purchase and the provision of the law of the State of Wisconsin then in force in that behalf, became the owner of the property, and franchises, and other things so purchased by him, and thereafter held the same, in trust, and only in trust, for the holders of the then outstanding bonds secured by said mortgages.

4 *a* And that afterwards, to wit, on or about the 23d day of May, A. D. 1859, the owners and holders of a large majority of the said bonds proceeded to organize anew, and then and there elected directors, and took the corporate name "Milwaukee and Minnesota Railroad Company," and said Barnes then and thereafter conveyed to said last-named company all the property and things by him purchased as aforesaid, and thereafter said

company proceeded, and conducted its business under and in pursuance of the charter of said La Crosse and Milwaukee Railroad Company, and thereby became, and ever since have continued, a corporation under and by virtue of the laws of said State, capable of sueing and being sued; and that said Milwaukee and Minnesota Railroad Company immediately thereafter entered into the possession of said property and franchises of said La Crosse and Milwaukee Railroad Company, so far as the same were in possession of said La Crosse and Milwaukee Railroad Company at the time of said sale.

That said bondholders at said new organization elected and chose the following named persons directors of said Milwaukee and Minnesota Railroad Company, viz:

Russell Sage, N. J. Emmons, Hans Crocker, Wm. E. Smith, Lemuel W. Weeks, W. B. Gilbert, William Gould, William R. Sill, and — Battershall, and that said directors immediately thereafter organized the said board of directors by electing and choosing Russell Sage president, N. J. Emmons vice-president, and Dwight W. Keyes secretary of said Milwaukee and Minnesota Railroad Company; and that neither the La Crosse and Milwaukee Railroad Company, nor any subsequent incumbrancer or incumbrancers, nor any other person or persons, did, within one year after said sale, redeem or offer to redeem the property and things so sold under said mortgages or trust deeds according to law in that behalf.

That by virtue of the said foreclosure of said deeds of trust or mortgages to said Barnes as hereinbefore set forth, and the organization of said Milwaukee and Minnesota Railroad Company, and conveyance by said Barnes a hereinbefore set forth, and the said premises not having been redeemed, as hereinbefore stated, the said Milwaukee and Minnesota Railroad Company, from and after May 21, 1860, became, under and by the laws of the State of Wisconsin, the successor of the La Crosse and Milwaukee Railroad Company, as to all the property and things described in said deeds, and the owner of and clothed with all the rights, privileges, franchises, and property, real and personal, and things in action, and effects of every nature and description, before then belonging to said La Crosse and Milwaukee Railroad Company, wherever situated and however circumstanced, subject only to such valid and legal liens and incumbrances thereon as were prior to said first deed to said Barnes; and that the said Milwaukee and Minnesota Railroad Company, being by law an incorporated company, composed of the creditors of the said La Crosse and Milwaukee Railroad Company, and purchasers at said foreclosure sale, (in the manner hereinbefore stated) as corporators, has a legal right to object to, resist and set aside, all conveyances, negotiations, sales, transfers, leases, mortgages, or judgments, which were or have been made or suffered by said La Crosse and Milwaukee Railroad Company with intent to hinder, delay, or defraud its creditors, and has the right to object to, resist, and set aside every illegal, unjust, or fraudulent claim of any person or persons against the said La Crosse and Milwaukee Railroad Company which is apparently a lien or incumbrance upon any of the property, rights, privileges, franchises, or other things whatsoever of said last-named company, which were embraced or described or intended to be embraced or described in either of said trust deeds to said Barnes, and now owned by said Milwaukee and Minnesota Railroad Company, as hereinbefore stated; and has the right to collect and enforce all actions and causes of action existing in favor of said La Crosse and Milwaukee Railroad Company and conveyed by said trust deeds to said Barnes, or either of them.

5 Your orator further shows that the said La Crosse and Milwaukee Railroad Company, heretofore, to wit, on and before the 26th day of September, A. D. 1857, were greatly embarrassed and in failing circumstances; that some of the creditors had before that time commenced suits

against said company, and others of its creditors were threatening to do so, and the said company was unable to pay its debts and prosecute the completion of its said railroad, which was then only completed and in operation from the city of Milwaukee to or near New Lisbon in said district; and that the said company then and there designing to hinder, delay, and defraud its creditors, and to hold its creditors at defiance and apply its revenues and means to the completion of its said road, did pretend to make and in form did make, execute, and deliver to said Selah Chamberlain a pretended deed or lease which is hereto attached and marked Exhibit No. 3, and made a part of this bill.

And your orator further shows that after the making and delivery of said last-named deed or lease to the said Chamberlain as aforesaid, to wit, on the day and year last aforesaid, the said Chamberlain entered into possession of all the property, franchises, and other things mentioned in and described in said deed or lease.

Your orator further shows that the said La Crosse and Milwaukee Railroad Company had no legal right or competent authority to make said deed or lease; that the making and delivery thereof
6 beyond the corporate powers of said company, and were void and of none effect; and that the same were and are as to all creditors of said company, and as to your orator, for the further reason that the said deed or lease was made, executed, and delivered as your orator charges the fact to be, by said company, with the intent and design on the part of said company, and on the part of its board of directors, to thereby hinder, delay, and defraud its creditors, and particlarly Vose, Livingston & Co., of New York, creditors of said company, and with intent to hinder and delay said Vose, Livingston & Co. from asserting their just claim and demand in regard to certain railroad iron of great value, to wit: the sum of one hundred thousand dollars and upwards, which intentions and designs of said company were well known to said Chamberlain when said deed or lease was delivered to and accepted by him, which your orator charges the fact to be, and that said Chamberlain accepted said deed or lease, and entered into possession as aforesaid for the purpose of aiding and abetting said company in its said unlawful intents and designs aforesaid.

And your orator further shows that afterwards, to wit, on the 2d day of October, A. D. 1857, the said La Crosse and Milwaukee Railroad Company and the said Chamberlain, fearing and being advised by the counsel of said Chamberlain that there was some doubt as to whether the said fraudulent purposes, designs, and intentions of the said company and the said Chamberlain could be accomplished under and by said deed or lease, and that there was some doubt whether said deed or lease would prevent said
7 Vose, Livingston & Co. from enforcing their just demand and claim aforesaid, did, on that day, further combine and confederate together to hinder, delay, and defraud the creditors of the said company, and to hinder, delay, and defraud said Vose, Livingston & Co., and prevent them from asserting their claims and enforcing their rights in regard to said railroad iron, and did then and there agree that said company should, and said company then and there did, to wit, at Milwaukee, in the said district, on said 2d day of October, 1857, confess and suffer a judgment against it, and in favor of said Chamberlain in the district court of the United States for the district of Wisconsin, without service of process or suit brought, for the sum of six hundred and twenty-nine thousand and eighty-nine dollars and seventy-two cents damages, and fifteen dollars and fifty cents costs, which said last-named judgment was in form duly confessed, entered, and docketed in said court; but that said company when it confessed and suffered said judgment to pass as aforesaid was not indebted to said Chamberlain to

company proceeded, and conducted its business under and in pursuance of the charter of said La Crosse and Milwaukee Railroad Company, and thereby became, and ever since have continued, a corporation under and by virtue of the laws of said State, capable of sueing and being sued; and that said Milwaukee and Minnesota Railroad Company immediately thereafter entered into the possession of said property and franchises of said La Crosse and Milwaukee Railroad Company, so far as the same were in possession of said La Crosse and Milwaukee Railroad Company at the time of said sale.

That said bondholders at said new organization elected and chose the following named persons directors of said Milwaukee and Minnesota Railroad Company, viz:

Russell Sage, N. J. Emmons, Hans Crocker, Wm. E. Smith, Lemuel W. Weeks, W. B. Gilbert, William Gould, William R. Sill, and — Battershall, and that said directors immediately thereafter organized the said board of directors by electing and choosing Russell Sage president, N. J. Emmons vice-president, and Dwight W. Keyes secretary of said Milwaukee and Minnesota Railroad Company; and that neither the La Crosse and Milwaukee Railroad Company, nor any subsequent incumbrancer or incumbrancers, nor any other person or persons, did, within one year after said sale, redeem or offer to redeem the property and things so sold under said mortgages or trust deeds according to law in that behalf.

That by virtue of the said foreclosure of said deeds of trust or mortgages to said Barnes as hereinbefore set forth, and the organization of said Milwaukee and Minnesota Railroad Company, and conveyance by said Barnes a hereinbefore set forth, and the said premises not having been redeemed, as hereinbefore stated, the said Milwaukee and Minnesota Railroad Company, from and after May 21, 1860, became, under and by the laws of the State of Wisconsin, the successor of the La Crosse and Milwaukee Railroad Company, as to all the property and things described in said deeds, and the owner of and clothed with all the rights, privileges, franchises, and property, real and personal, and things in action, and effects of every nature and description, before then belonging to said La Crosse and Milwaukee Railroad Company, wherever situated and however circumstanced, subject only to such valid and legal liens and incumbrances thereon as were prior to said first deed to said Barnes; and that the said Milwaukee and Minnesota Railroad Company, being by law an incorporated company, composed of the creditors of the said La Crosse and Milwaukee Railroad Company, and purchasers at said foreclosure sale, (in the manner hereinbefore stated) as corporators, has a legal right to object to, resist and set aside, all conveyances, negotiations, sales, transfers, leases, mortgages, or judgments, which were or have been made or suffered by said La Crosse and Milwaukee Railroad Company with intent to hinder, delay, or defraud its creditors, and has the right to object to, resist, and set aside every illegal, unjust, or fraudulent claim of any person or persons against the said La Crosse and Milwaukee Railroad Company which is apparently a lien or incumbrance upon any of the property, rights, privileges, franchises, or other things whatsoever of said last-named company, which were embraced or described or intended to be embraced or described in either of said trust deeds to said Barnes, and now owned by said Milwaukee and Minnesota Railroad Company, as hereinbefore stated; and has the right to collect and enforce all actions and causes of action existing in favor of said La Crosse and Milwaukee Railroad Company and conveyed by said trust deeds to said Barnes, or either of them.

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against said company, and others of its creditors were threatening to do so, and the said company was unable to pay its debts and prosecute the completion of its said railroad, which was then only completed and in operation from the city of Milwaukee to or near New Lisbon in said district; and that the said company then and there designing to hinder, delay, and defraud its creditors, and to hold its creditors at defiance and apply its revenues and means to the completion of its said road, did pretend to make and in form did make, execute, and deliver to said Selah Chamberlain a pretended deed or lease which is hereto attached and marked Exhibit No. 3, and made a part of this bill.

And your orator further shows that after the making and delivery of said last-named deed or lease to the said Chamberlain as aforesaid, to wit, on the day and year last aforesaid, the said Chamberlain entered into possession of all the property, franchises, and other things mentioned in and described in said deed or lease.

Your orator further shows that the said La Crosse and Milwaukee Railroad Company had no legal right or competent authority to make or deliver said deed or lease; that the making and delivery thereof were acts
6 beyond the corporate powers of said company, and were therefore void and of none effect; and that the same were and are void as to all creditors of said company, and as to your orator, for the further reason that the said deed or lease was made, exeuted, and delivered as your orator charges the fact to be, by said company, with the intent and design on the part of said company, and on the part of its board of directors, to thereby hinder, delay, and defraud its creditors, and particlarly Vose, Livingston & Co., of New York, creditors of said company, and with intent to hinder and delay said Vose, Livingston & Co. from asserting their just claim and demand in regard to certain railroad iron of great value, to wit: the sum of one hundred thousand dollars and upwards, which intentions and designs of said company were well known to said Chamberlain when said deed or lease was delivered to and accepted by him, which your orator charges the fact to be, and that said Chamberlain accepted said deed or lease, and entered into possession as aforesaid for the purpose of aiding and abetting said company in its said unlawful intents and designs aforesaid.

And your orator further shows that afterwards, to wit, on the 2d day of October, A. D. 1857, the said La Crosse and Milwaukee Railroad Company and the said Chamberlain, fearing and being advised by the counsel of said Chamberlain that there was some doubt as to whether the said fraudulent purposes, designs, and intentions of the said company and the said Chamberlain could be accomplished under and by said deed or lease, and that there was some doubt whether said deed or lease would prevent said
7 Vose, Livingston & Co. from enforcing their just demand and claim aforesaid, did, on that day, further combine and confederate together to hinder, delay, and defraud the creditors of the said company, and to hinder, delay, and defraud said Vose, Livingston & Co., and prevent them from asserting their claims and enforcing their rights in regard to said railroad iron, and did then and there agree that said company should, and said company then and there did, to wit, at Milwaukee, in the said district, on said 2d day of October, 1857, confess and suffer a judgment against it, and in favor of said Chamberlain in the district court of the United States for the district of Wisconsin, without service of process or suit brought, for the sum of six hundred and twenty-nine thousand and eighty-nine dollars and seventy-two cents damages, and fifteen dollars and fifty cents costs, which said last-named judgment was in form duly confessed, entered, and docketed in said court; but that said company when it confessed and suffered said judgment to pass as aforesaid was not indebted to said Chamberlain to

the amount for which said judgment was rendered, and did not owe, and was not indebted to said Chamberlain in any amount whatever; but is informed, and thereupon shows to your honors, that no consideration or value
8 was ever received by, or ever accrued to, said company on account of said judgment, and that there was no consideration whatever for said judgment, and that said judgment was only confessed by said company in pursuance of said unlawful combination and confederacy between said company and said Chamberlain, and for the purpose of bolstering up said fraudulent deed or lease, and for the purpose and with the intent and design on the part of said company, and its board of directors, and said Chamberlain, to thereby hinder, delay, and defraud the creditors of said company, and particularly Vose, Livingston & Co.

Your orator further shows that the said deed or lease in its operation and legal effect, until the same was set aside as hereinafter stated, operated greatly to embarrass and unreasonably to hinder, delay, and defraud the creditors of said company in the enforcement of their just claims and demands against said company, and created and continued trusts for the benefit of said company to an unlimited amount, and enabled said company, through said Chamberlain as its pretended lessee, to carry on and prosecute its business for its own benefit in defiance of its creditors, and enabled said company to enjoy and receive benefits from its said property, while its creditors were thereby unreasonably hindered, delayed, and prevented
9 from enforcing collection of their just debts against said company out of said property and things conveyed in said lease, and the rents, revenues, income, and tolls arrising therefrom, and the use and operation thereof; and that for these reasons the said deed or lease to said Chamberlain and said judgment confessed in aid of and to bolster up said lease were void in law, without regard to the intentions and designs with which, in fact, said lease was given, and said judgment confessed, as hereinbefore stated.

And your further shows that the said Chamberlain falsely and fraudulently pretends that said company was, at the time when said deed or lease was made, executed, and delivered, and said judgment confessed as aforesaid, indebted to him, said Chamberlain, in the amount for which said judgment was confessed, on account of and for certain work done and labor performed and material furnished before that time by said Chamberlain for said company in completing its said road; but your orator is informed and believes that upon a fair, just, and equitable accounting and settlement between said Chamberlain and said company, in that behalf, the said company would not have been found at that time indebted to said Chamberlain.

Your orator further shows that while said Chamberlain was in possession of said road and other things under said deed or lease, and after
10 the confessing and docketing of said judgment in his favor, to wit, on the 3 day of October, A. D. 1857, one Newcomb Cleveland recovered judgment against said La Crosse and Milwaukee Railroad Company in the said district court of the United States for the district of Wisconsin, for the sum of one hundred and eleven thousand seven hundred dollars and seventy-one cents damages and costs; and that afterwards said Cleveland caused a writ of fieri facias to be issued on said judgment and delivered to the marshal of said district in due form of law, who afterwards levied the same upon certain property and things belonging to said company, also mentioned in and conveyed by said lease. That afterwards, on the 31st day of October, A. D. 1857, said Cleveland exhibited, on the equity side of said district court, his bill of complaint against said La Crosse and Milwaukee Railroad Company and Selah Chamberlain and others, defendants; that said Cleveland, in his said bill of complaint, and made part of this bill, showed and charged

that said judgment in his favor was wholly unsatisfied, that a writ of fieri facias had been issued thereon and levied upon certain property and things belonging to said company, also mentioned in and conveyed by said lease, and that the said lease and judgment so given and confessed by said company to said Selah Chamberlain was a cloud upon the right of him,
11 said Cleveland, to enforce payment of his said judgment out of and by sale of the property and things so levied on by his writ of fieri facias, and prayed the aid of said district court in equity to enforce the collection of his said judgment against the property of said company thus levied upon; and the said Cleveland, in his said bill of complaint, also showed to said court that the said deed or lease and said judgment given and confessed to said Chamberlain, hereinbefore mentioned, were made and confessed without consideration, and with intent to thereby hinder, delay, and defraud the creditors of said company, and prayed the said court that the said deed or lease and said judgment to said Chamberlain might be by said court declared to be null and void, and for general relief; that upon said bill subpœna was duly issued and personally served upon both said La Crosse and Milwaukee Railroad Company and Selah Chamberlain; and that both said Chamberlain and said last-named company appeared in said suit in equity in favor of said Cleveland and put in their answers thereto in said district court, denying that said deed or lease and said judgment given and confessed to said Chamberlain, hereinbefore mentioned, were given and confessed without consideration and with intent to thereby hinder, delay, and defraud the creditors of said company; and that said Cleveland took issue upon said
12 answers of said company and said Chamberlain, by filing replications thereto; and that thereupon in that suit proofs were taken upon said issue thus made as to the intent with which said deed or lease was given and said judgment confessed to said Chamberlain, and as to the true state of accounts between said company and said Chamberlain at the time said judgment was confessed; and that after a full hearing on the merits in said suit, and upon the precise issues raised therein as to the validity of said lease and judgment to said Chamberlain, between said Chamberlain and said company and said Chamberlain, the said district court, in equity, having full jurisdiction of the subject matter and parties in said suit, afterwards made a final decree in said suit, a copy of which is hereto attached, and marked Exhibit No. 4, and made a part of this bill; which said final decree is yet of full force, not vacated or reversed. Your orator further shows that after said decree was made and rendered by said court as hereinbefore stated, and about the 2d day of March, A. D. 1859, the said Chamberlain purchased said judgment in favor said Cleveland and procured from the solicitor of said Cleveland in said suit in equity in favor of said Cleveland a substitution in blank,
13 so that said Chamberlain could thereafter control said judgment in favour of said Cleveland, and said suit in equity in favour of said Cleveland, for his, said Chamberlain's, exclusive use, benefit, and advantage.

Your orator further shows that it is advised, and therefore insists, that the said decree, a copy of which is Exhibit No. 5, hereto attached, having been rendered in a suit in which said Chamberlain and said La Crosse and Milwaukee Railroad Company were both parties, and over which said suit and said parties said court had full and complete jurisdiction, is binding and conclusive upon the said Chamberlain, and has the effect to entirely set aside and annul the said lease, to all intents and purposes, and did in fact set the same aside and annul the same, and did in fact vacate, open, and set aside the said judgment so entered and docketed in favor of the said Chamberlain, to all intents and purposes, as hereinbefore stated; and that since the entering and enrolling of said decree, which still remains of full forced and unreversed, the said Chamberlain has not been, and is not now, a judg-

ment creditor of the said La Crosse and Milwaukee Railroad Company, and has not, since said decree was entered, had or held any lien or incumbrance upon any of the railroad property or franchises of said La Crosse and
14 Milwaukee Railroad Company; and your orator here and now claims the benefit and advantage of said decree, and relies upon the same as conclusive by way of estoppel against said Chamberlain, and in favor of your orator, as to all the matters and things therein decreed, and in the precise form and *and* language therein decreed and determined.

But your orator further shows that, notwithstanding said decree, and in open violation and contempt of said perpetual injunction therein decreed and contained, the said Chamberlain did, from and after the entering and date of said decree, to wit, the 11th day of February, A. D. 1859, continue, as he had before been, "using, managing, running, and controlling said railroad, and the rolling stock, personal property, together with its appurtenances and franchises, and everything connected therewith, described in said pretended lease; and did, from the use and operation thereof thereafter, in fraud of said La Crosse and Milwaukee Railroad Company and its creditors, and in direct violation of said perpetual injunction, of the revenue, tolls, and income of said railroad and other property, receive more than the sum of two hundred thousand dollars, and more than the amount of said judgment rendered in favor of said Cleveland, as aforesaid, so owned
15 by him, said Chamberlain, and all interest and costs thereon; which said sum of more than two hundred thousand dollars, so received by said Chamberlain as aforesaid, the said Chamberlain still holds, and has never accounted therefor with the La Crosse and Milwaukee Railroad Company or your orator, or any other creditor or creditors of said La Crosse and Milwaukee Railroad Company.

And your orator further shows that said judgment, so rendered in favor of said Cleveland, remains unsatisfied upon record, and is an apparent lien, charge, and incumbrance upon the La Crosse and Milwaukee railroad, so called, from Milwaukee to Portage, now owned by your orator, prior to the title and right of your orator thereto; but that the same ought in equity to be cancelled by an application of the amount thereof from the monies so received by said Chamberlain after the rendition of said final decree, on the 11th day of February, A. D. 1859, as hereinbefore stated.

To the end, therefore, that the said Selah Chamberlain may, if he can, show why your orator is not entitled to the relief hereinafter prayed
16 for, and that the said Selah Chamberlain may full, true, direct, and perfect answer make to all and singular the matters and things hereinbefore stated, (but not upon oath, the oath of the said Selah Chamberlain to said answer or answers being hereby expressly waived,) as fully and particularly as if the same were hereinafter repeated, and he thereupon particularly interrogated, and that not only to the best of his knowledge and remembrance, but also as to the best of his information, hearsay, and belief; and that the said Chamberlain may be ordered, adjudged, and decreed to apply to the payment and satisfaction of said judgment rendered in favor of said Cleveland, the amount thereof, together with interest and costs thereon, from the money so received by him, as hereinafter stated, after the date of February 11, 1859; and that of and concerning said money so received by him, and said judgment in favor of said Cleveland, an account may be stated, in which said Chamberlain shall be charged with the amount of said money so received by him, together with interest thereon, and credited with the amount due in said judgment rendered in favor of said Cleveland, including interest thereon, and all costs properly chargeable upon the same, and
17 that a balance may be ascertained; and that said judgment rendered in favor of said Cleveland may, by order of this honorable court, be

satisfied, and ordered to be cancelled; and that said Chamberlain be restrained from setting up or pretending any further right or claim on account of said judgment in favor of said Cleveland; and that the said Chamberlain be ordered to pay over to your orator such balance as may be found against him on said accounting; and in case said accounting shall show a balance in favor of said Chamberlain, your orator here offers to pay the same to said Chamberlain, as the court shall direct; and that your orator may have such other or further relief as the nature of its case may require, and as shall be agreeable to equity, may it please your honors to grant unto your orator the writ of subpœna to be issued out of and under the seal of said court, according to law, to be directed to said Selah Chamberlain, and commanding him, said Selah Chamberlain, on a day certain therein to be named, and under a certain penalty therein to be named, to be and appear before your honors, in said court in equity, and there to answer the matters and things aforesaid, and to stand to and abide such order or decree as your honors
18 may make in the premises and as shall be agreeable to equity and good conscience.

The Milwaukee and Minnesota Railroad Company, by—
MAT. H. CARPENTER, *Solicitor.*

MAT. H. CARPENTER, *of Counsel.*

No. 230. Filed June 29, 1863.

19 EXHIBIT No. 1.

Trust deed.

This indenture, made the twenty-first day of June, in the year of our Lord eighteen hundred and fifty-eight, between the La Crosse and Milwaukee Railroad Company, a corporation created by the legislature of the State of Wisconsin, party of the first part, and William Barnes, of the city of Albany, and State of New York, trustee as hereinafter mentioned, party of the second part.

Whereas the said railroad company, for the purpose of providing for and securing the payment of its floating debt, and for other purposes, has determined to issue its bonds for a sum not exceeding two millions of dollars in the aggregate, embracing one thousand bonds of one thousand dollars each, fourteen hundred bonds of five hundred dollars each, and three thousand bonds of one hundred dollars each, with interest warrants in the usual form attached, and which bonds will be substantially in the following form, to wit:

UNITED STATES OF AMERICA, *State of Wisconsin:*

No. ———. $———.

Know all men by these presents that the La Crosse and Milwaukee Railroad Company, for value received, acknowledge itself indebted to the bearer thereof, the sum of dollars, which sum it agrees to pay to the bearer hereof on the first day of July, in the year of our Lord one thousand eight hundred and eighty-eight, at the Albany Exchange Bank, in the city of Albany, with interest at the rate of seven per cent. per annum, payable at the Albany Exchange Bank, in the city of Albany, semi-annually, on the first day of January and the first day of July in each year, on presentation or delivery of the interest warrants or coupons hereto annexed. This is one of a series of bonds, all of the same tenor, making in the aggregate the sum of two millions of dollars, for securing the payment of which a trust deed has been executed by said company to William Barnes, of the city of Albany, and State of New York, conveying to him (subject to certain

charges thereon) the railroad of said company, commencing in the city of Milwaukee, and running from thence to La Crosse, a distance of about two hundred miles, part of which road has been constructed and is now in full operation, and the residue is in process of construction, together with the equipments and all other things pertaining, or which may hereafter pertain, to the road so conveyed, reference to which deed is hereby had and made for a more full description of its contents. And for further securing and providing for the payment of said bonds, the said deed of trust provides for the creation of a sinking fund, the first payment of $25,000 to which is to be made by said company to William Barnes, of Albany, the trustee named in said deed of trust, on the first day of July, eighteen hundred and sixty-one, and thereafter a like sum annually, with which sum, as from time to time paid, the said trustee is to purchase outstanding bonds secured by said deed of trust, as is more particularly specified in said deed of trust, to which reference is hereby made.

In witness whereof, said railroad company has hereunto affixed its corporate seal, and caused the same to be signed by the president and secretary, this 21st day of June, in the year of our Lord one thousand eight hundred and fifty-eight.

——— ———, *President.*
——— ———, *Secretary.*

Registered and countersigned this 185 .

——— ———, *Trustee.*

And whereas said railroad company has determined to secure the payment of said bonds, with the interest thereon, in the manner herein provided:

Now, therefore, this indenture witnesseth, that said railroad company, in consideration of the premises and the sum of one dollar paid by said party of the second part, has granted, bargained, sold, conveyed, and confirmed, and does by the presents, grant, bargain, sell, convey, and confirm, unto said party of the second part all and singular the railroad of said company, commencing in the city of Milwaukee, and running from thence to La Crosse, a distance of about two hundred (200) miles, a part of which road has been constructed, and is now in full operation, and the residue is in process of construction, including all and singular the several tracts, pieces, or parcels of land which now are, or hereafter may be or constitute the site of the roadways, turnouts, engine-houses, workshops, depots, and other buildings, and all the other lands and real estate which now constitute, or may hereafter constitute, or be a part of or appertain to said railroad. And also all and singular the superstructure of said railroad, whether now made or to be made hereafter, and all the engine-houses, workshops, depots, and other buildings, and all the other improvements on or appertaining to said railroad, whether now built or made or to be built or made hereafter. And also all and singular the locomotive engines, and other rolling stock, and all the other equipments of every kind and description, which have already been or may hereafter be procured for or used on said railroad, and all the materials, tools, implements, and utensils, and other personal property which have been or may hereafter be procured for or used in connection with said railroad; and also all and singular the rights, liberties, and privileges, and franchises of said railroad company, so far as they relate to said railroad from Milwaukee to La Crosse.

And it is hereby declared to be the intention of the parties to these presents to convey to and vest in said party of the second part all the property, real and personal, of said railroad company, to be acquired

hereafter, as well as that which has been already acquired, together with all the rights, liberties, privileges, and franchises of said railroad company, in respect to said railroad from Milwaukee to La Crosse, as fully and amply as the same might be conveyed if said railroad had already been fully constructed and equipped, excepting, however, any lands which now do or hereafter may belong to said company under any grant from the United States or the State of Wisconsin; subject, nevertheless, to lines already existing upon the property and franchises above mentioned, as follows: To a first mortgage upon the eastern division of the said road, between Milwaukee and Portage City, to secure outstanding bonds of said company to the amount of about nine hundred and twenty-two thousand dollars. Also bonds to the city of Milwaukee to the amount of three hundred and fourteen thousand dollars. Also to bonds secured by second mortgages on said eastern division, subject to the amount of one million dollars. Also subject to a mortgage of four million dollars upon the line of said road from Portage City to La Crosse, and to a second mortgage of about two hundred thousand dollars on the road from Portage City to La Crosse, and from the junction near the village of Tomah to the terminus of the road on the lakes or river St. Croix. To have and to hold all and singular the property, real and personal, with the hereditaments and appurtenances, and all and singular the rights, liberties, and franchises hereby conveyed, or intended to be conveyed, subject to the aforesaid mortgages, to the aforesaid party of the second part and his successors, and his heirs and assigns forever; in trust, nevertheless, and upon the trusts, terms, and conditions herein expressed.

First. Until default shall be made in the payment of said bonds or some of them, or the interest thereon, said railroad company shall be suffered and permitted to hold and enjoy the said railroad, with all the equipments and all other things appertaining to the same, and to use the same, and to take and receive the profits thereof to its own use, in the same manner as though this deed had not been made.

Second. In case default for the space of 15 days shall be made in the payment of any of said interest warrants or coupons as they respectively fall due, or if default for the like period shall be made in the payment at maturity of the principal sum of money mentioned in any of the said bonds, then and in either of said cases it shall be lawful, and said trustee is hereby authorized in his discretion, either in person or by his attorney or attorneys, agents or agents, to enter into and upon and take possession of all and singular the railroad and all the other property, real and personal, hereinbefore conveyed or intended to be conveyed, and to take and receive the income and profits thereof, and to sell and singular said railroad and other property, with all the rights, liberties, privileges, and franchises of said railroad company in respect to said railroad, either at public or private sale, and to execute and deliver to the purchaser or purchasers deeds and conveyances which shall vest in such purchaser or purchasers all the estate, right, title, and interest, whether legal or equitable, of said trustee and said railroad company of, in, or to said property, rights, liberties, privileges, and franchises, and every part and parcel thereof. But before any sale shall be made at auction, notice of such intended sale shall be published once in each week for three weeks at the least in two newspapers published in the city of New York, and in a newspaper published in the city of Milwaukee; and should any further notice be required by the laws of the State of Wisconsin, the same shall be given. And in case default shall at any time be made in the payment of the interest on the bonds then outstanding, or in case default shall be made in the payment of the principal sum of money mentioned in said bonds, or any of them, at maturity, then and either of said cases, said trustee, on the written

request of the holder or holders of bonds then outstanding, to the amount, in the aggregate, of one hundred thousand dollars, shall proceed to make such sales and conveyances so as above mentioned.

Third. Said railroad company covenants and agrees to and with said trustee, and his successor, that said company will, from time to time, during the continuance of the trust, make, execute, and cause to be duly recorded, and deliver to said trustee all such further conveyances and assurances, and will do all such further acts and things as may be either necessary or proper for more effectually vesting in said trustee all such right, title, interest, or estate, both legal equitable, as said railroad company now has, or may hereafter acquire, of, in, or to all and every part of the property hereby conveyed, or intended to be conveyed, together with the rights, liberties, privileges, and franchises aforesaid.

Fourth. Said railroad company will cause this indenture to be duly recorded in all proper places, and will do whatever else may be necessary or proper to give full effect to the conveyance, and will pay and discharge all taxes, charges, liens and other burdens which either exist, or may hereafter arise, or be imposed upon the property hereby conveyed, or intended to be conveyed, and the trustee assumes no duty or responsibility on these subjects, or any of them, nor in relation to any other matter or thing, except as herein provided.

Fifth. This trust extends only to such bonds as shall be registered and countersigned by the trustee, and when all of said bonds shall be satisfied and discharged the trust shall cease. The trust shall also cease at the end of six calendar months after the principal moneys shall fall due, as to all such bonds as shall not then have been presented for payment. And whenever the trust shall determine, and any monies which may be due to the trustees shall be paid, the trustee will reconvey to said railroad company all this right, title, and interest of and to the trust property.

Sixth. Said railroad company will, from time to time, pay all costs, charges, expenses, and compensation of the trustee, in, about or for the execution of the trust, and will in all things keep him fully indemnified and saved harmless of, from and against all damages, costs, charges, and expenses which he may sustain or be part to in consequence of accepting this trust, or of anything which may be done or omitted under it, saving only such damages as may arise from the culpable act or neglect of the trustee.

Seventh. And the said railroad company agree to establish and provide a sinking fund for the gradual redemption and payment of said bonds, and for that purpose will pay to the said trustee, on the first day of July, eighteen hundred and sixty-one, and annually thereafter until this trust is closed, the sum of twenty-five thousand dollars. With such sums as from time to time the same shall be paid, the said trustee shall from time to time purchase outstanding bonds secured by this deed of trust, at the lowest price
21 he can purchase the same for, first giving ten days' public notice in one or more newspapers published in New York, Albany, and Milwaukee, respectively, of his desire to purchase so many of said bonds as can be obtained for the money of said sinking fund then in his hands, and all bonds so purchased belonging to said sinking fund shall be retained by said trustee until this trust be closed.

Eighth. The trustee is hereby authorised to appoint all such attorneys, counsellors, clerks, and other agents, as he may deem proper in the execution of the trust, and shall not be answerable for the defaults or other misconduct of such attorneys, counsellors, or other agents, unless chargeable with culpable negligence in their selection, nor shall the trustee be responsible for anything short of gross negligence or wilful default in the discharge of any of his duties.

Ninth. All moneys which may be received by the trustee under trust, after deducting therefrom all costs, counsel fees, charges, and other expenses of the trustee, and his compensation for executing the trust, shall be applied to the payment of the bonds which may be issued under the trust, and the surplus, if any, shall be paid to said railroad company.

Tenth. The supreme court of the State of New York may remove the trustee on the application of the railroad company, reasonable notice being first given to said trustee. The trustee may resign his trust, and be thenceforward discharged from all further duty or obligation in relation thereto: provided, such resignation, after reasonable notice to the president or secretary of said railroad company, shall be approved by said supreme court. And on the death, removal, or resignation of a trustee, said supreme court may appoint a new trustee, who shall thereupon acquire and have all the right, title, interest, and authority under the trust, and be subject to all duties and responsibilities under the same, as fully as though he had been the original trustee, and had executed this deed.

Eleventh. Said trustee hereby accepts, and covenants and agrees to and with said railroad company, faithfully to execute said trust.

In witness whereof, said railroad company has hereto affixed its corporate seal and caused the same to be subscribed by its president and secretary, and the trustee has subscribed his name and affixed his seal the day and year first above written.

[SEAL.] La Crosse and Milwaukee Railroad Company, by—
N. P. STANTON, *President.*
LOCKWOOD L. DOTY,
Secretary of the La Crosse & Milwaukee Railroad Company.
WILLIAM BARNES, *Trustee.*

Signed, sealed, executed, and delivered in our presence, as to the La Crosse and Milwaukee Railroad Company, by N. P. Stanton, president, and as to William Barnes, the said trustee.

CLARK, B.
J. C. CARY.

Signed, executed, and delivered in our presence, as to Lockwood L. Doty, secretary of said La Crosse and Milwaukee Railroad Company.

EDWARD P. WHALING.
P. M. JOHNSON.

STATE OF NEW YORK, *County of Albany, ss:*

Be it remembered, that on this second day of July, in the year one thousand eight hundred and fifty-eight, before me, the subscriber, a commissioner in and for said State, appointed by the governor of the State of Wisconsin to take the acknowledgment and proof of the execution of deeds and other conveyances or leases, and of any contract, letter of attorney, or other writing, under seal or not, administer oaths, and take and certify depositions to be used or recorded in the State of Wisconsin, appeared Nehemiah P. Stanton, described in and who executed the above instrument in writing as the president of and in behalf of the La Crosse and Milwaukee Railroad Company, and acknowledged that he executed the said instrument as president as aforesaid, freely for the purposes therein stated, and I certify that the said person who made the said acknowledgment is personally known to me to be the individual described in and who executed the said instrument. And the said Nehemiah P. Stanton, being by me duly sworn, says that he is the president of the La Crosse and Milwaukee Railroad Company, the above-named corporation, and that the seal affixed to the above instrument is the corporate seal of the said corporation, and that the said corporate seal and

his signature were affixed to said instrument by the authority and direction of said corporation, and by order of the board of directors thereof.

In testimony whereof, I have hereunto set my hand and seal official, at my office, No. seventy-one State street, in the city of Albany, the day and year first above written.

Given under my hand and official seal the day and year above written.

[SEAL.] EDWARD WADE,

Commissioner of the State of Wisconsin in and for the State of New York.

STATE OF NEW YORK, *County of Albany, ss:*

Be it remembered, that on the second day of July, in the year one thousand eight hundred and fifty-eight, before me, the subscriber, a commissioner in and for said State, appointed by the governor of the State of Wisconsin to take the acknowledgment and proof of the execution of deeds or other conveyances or leases, and of any contract, letter of attorney, or other writing, under seal or not, administer oaths, and take and certify depositions to be used or recorded in the said State of Wisconsin, appeared William Barnes, described in and who executed the above instrument of writing between him, as one of the parties thereto, and the La Crosse and Milwaukee
22 Railroad Company, the other party thereto, and the said William Barnes acknowledged that he executed the said instrument freely, for the purposes therein stated; and I certify that the person who made the said acknowledgment is personally known to me to be the individual described in and who executed the said instrument.

In testimony whereof, I have hereunto set my hand and seal official, at my office, No. seventy-one State street, in the city of Albany, the day and year first above written.

Given under my hand and official seal the day and year above written.

[SEAL.] EDWARD WADE,

Commissioner of the State of Wisconsin in and for the State of New York.

STATE OF WISCONSIN, *County of Milwaukee, ss:*

Be it remembered, that on this seventh day of July, eighteen hundred and fifty-eight, before me personally appeared Lockwood L. Doty, to me well and personally known to be the person described in and who executed the above instrument in writing as secretary of and in behalf of the La Crosse and Milwaukee Railroad Company, and acknowledged that he executed the same freely and as the free act and deed of the said La Crosse and Milwaukee Railroad Company, for the uses and purposes therein mentioned. And the said Lockwood L. Doty, being by me duly sworn, says that he is the secretary of the La Crosse and Milwaukee Railroad Company, the above-named corporation, and that the seal affixed to the above instrument is the corporate seal of the said corporation, and that the said corporate seal and his signature were affixed to said instrument by the authority and direction of said corporation, and by order of the board of directors thereof.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal.

[SEAL.] E. MARINER,

Notary Public, Milwaukee County, Wisconsin.

Recorded July 8th, 1858, at 8 o'clock a. m.

23 EXHIBIT No. 2.

Indenture, made the eleventh day of August, one thousand eight hundred

and fifty-eight, between the La Crosse and Milwaukee Railroad Company, a corporation created by the legislature of the State of Wisconsin, party of the first part, and William Barnes, of the city of Albany, and State of New York, trustee as hereinafter mentioned, and under and by virtue of an indenture made by and between said corporation and said Barnes, on the twenty-first day of June, one thousand eight hundred and fifty-eight, party of the second part.

Whereas the Congress of the United States, by an act approved June 3d, 1856, entitled "An act granting public lands to the State of Wisconsin, to aid in the construction of railroads in said State," did enact as follows:

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That there be, and is hereby, granted to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from Madison or Columbus, by the way of Portage City, to the St. Croix River or Lake, between townships twenty-five and thirty one, and from thence to the west end of Lake Superior and to Bayfield; and also from Fond du Lac, on Lake Winnebago, northerly to the State line, every alternate section of land, designated by odd numbers, for six sections in width on each side of said roads respectively. But in case it shall appear that the United States have, when the line or routes of said roads are definitely fixed, sold any sections or parts thereof granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections above specified, as much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emptien has attached as aforesaid, which land thus selected in lieu of those sold and which pre-emption has attached as aforesaid, together with the sections and parts of sections, designated by odd numbers as aforesaid and appropriated as aforesaid, shall be held by the State of Wisconsin for the use and purpose aforesaid. Provided, that the lands to be so located shall in no case be farther than fifteen miles from the line of the roads in each case, and selected for and on account of said roads. Provided further, that the lands hereby granted shall be exclusively applied in the construction of the road for which it was granted and selected, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever. And provided further, that any and all lands reserved to the United States by any act of Congress, for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatever, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the route of said railroad through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

SEC. 2. *And be it further enacted,* That the sections and parts of sections of land, which by such grant shall remain to the United States, within six miles on each side of said roads, shall not be sold for less than double the minimum price of the public lands, when sold, nor shall any of the said lands become subject to private entry until the same have been first offered at public sale at the increased price.

SEC. 3. *And be it further enacted,* That the said lands hereby granted to said State shall be subject to the disposal of the legislature thereof, for the purposes aforesaid, and no other, and the said railroads shall be and remain public highways, for the use of the government of the United States, free from toll or other charge upon the transportation of property or troops of the United States.

SEC. 4. *And be it further enacted,* That the lands hereby granted to said State shall be disposed of by said State only in the manner following; that is to say, that a quantity of land not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of road respectively, may be sold, and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of either of said roads are completed, then another like quantity of land hereby granted may be sold, and so from time to time until said roads are completed; and if said roads are not completed within ten years, no further sales shall be made, and the land unsold shall revert to the United States.

SEC. 5. *And be it further enacted,* That the United States mail shall be transported over said road, under the direction of the Post Office Department, at such price as Congress may by law direct. Provided, that until such price is fixed by law, the Postmaster General shall have the power to determine the same.

Approved June 3d, 1856.

And whereas the legislature of the State of Wisconsin subsequently passed an act, approved October 11th, 1856, which is in the following words: "An act to grant certain lands to the La Crosse and Milwaukee Railroad Company, and to execute the trust created by an act of Congress, entitled 'An act granting public lands to the State of Wisconsin, to aid in the construction of railroads in said State,' approved June 3d, 1856." The people of the State of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. The La Crosse and Milwaukee Railroad Company is hereby authorized and empowered to survey, locate, construct, complete, and perpetually to have, use, maintain, and operate railroads, with one or more tracks or lines from the city of Madison, in the county of Dane, and from the village of Columbus, in the county of Columbia, on the most direct and feasible route, by the way of Portage City, to the St. Croix River or Lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior and to Bayfield, and shall have, possess, exercise, and enjoy the same rights, privileges, functions, franchises, authority, and immuni-
24 ties with reference to the said routes, or any railroad to be built thereon, as it now possesses and enjoys with reference to any route it is now authorized to occupy, or any railroad built, or to be built, thereon; and there is hereby conferred upon the La Crosse and Milwaukee Railroad Company all the power and authority contained in the charter of said company, and in the acts amendatory thereof, for the purpose of carrying out the objects of this act, and of appropriating and applying the lands hereinafter in this act granted, or their proceeds, to aid in the construction of railroads by this act authorized to be built.

SEC. 2. The said roads shall be constructed on the most direct and feasible routes from Madison to Portage City, and from Columbus to Portage City, and simultaneously, as nearly as practicable, and both of them shall be completed by the last day of December, A. D. 1858. And for the purpose of estimating and selecting lands granted by Congress, the city of Madison is hereby designated as the point of commencement of said road, and the whole of the railroad hereby authorized to be constructed shall be constructed by said La Crosse and Milwaukee Railroad Company within ten years from the 3d day of June, 1856.

SEC. 3. The said La Crosse and Milwaukee Railroad Company shall never set up the defence of usury to any contract in any court whatsoever; it may purchase and own rails, chairs, spikes, engines, tenders, cars, and all other things necessary and useful for the construction or operation of a railroad, and sell the same, and shall also have power and authority to operate its

said roads, or either of them, in connection with any and all other railroads which may cross, come up to, or connect with the said railroads, or either of them, upon such terms as shall be mutually agreed upon by and between the said companies. Provided, however, that the said La Crosse and Milwaukee Railroad Company, in making any such contract as last aforesaid, shall give no preference to one company over any other such company or companies as last above mentioned, but all such companies shall be put upon the same equal terms. And provided also, that if the said La Crosse and Milwaukee Railroad Company, and such other railroad company as may desire a running connection with the same, shall at any time not be able to agree upon the terms of such connections, then and in that case either party may apply to the circuit court of the circuit in which such connection may be sought, and the said circuit court shall appoint three commissioners, whose duty it shall be forthwith to proceed to examine and adjust the terms on which the said connection shall exist, and the said award of terms of connection shall be filed in the office of the secretary of state, and shall be binding on both parties for the term of two years. Such application shall be on not less than ten days' notice in writing, to be given by the party making such application to the adverse party.

SEC. 4. For the purpose of aiding in the construction of the railroads which by this act the said La Crosse and Milwaukee Railroad Company is authorized to construct, all the interest and estate, present or prospective, of this State, in or to any and all the lands granted by the government of the United States to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from Madison or Columbus, by way of Portage City, to the St Croix River or Lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior and to Bayfield, by virtue of an act of Congress entitled "An act granting a portion of the public lands in the State of Wisconsin to aid in the construction of railroads," approved June 3d, 1856, together with all and singular the rights, privileges, and immunities conferred, or intended to be conferred, by the said act of Congress, are hereby granted to the said La Crosse and Milwaukee Railroad Company. Provided, that the said land shall be exclusively applied in the construction of that road for which it was granted and selected, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatever. And provided further, that the title to said lands shall vest in the said La Crosse and Milwaukee Railroad Company in the manner following, that is to say: Whenever twenty continuous miles of said road shall have been completed, so as to admit of running regular trains on the same, the governor of this State shall certify to the Secretary of the Interior the fact that such twenty continuous miles of such roads are completed as aforesaid, then the title to two hundred and forty sections of said lands shall vest in the La Crosse and Milwaukee Railroad Company; and when a second continuous twenty miles of said road shall have been completed, so as to admit of running regular trains of cars on the same, the governor shall certify as before, and thereupon a further quantity of one hundred and twenty sections of said land shall vest in said company; and so from time to time until said roads are completed. And it shall be the duty of the governor so to certify to the Secretary of the Interior whenever such twenty miles are completed so as to admit running regular trains of cars on the same; and the governor of the State shall in his official capacity, and on behalf of the State, and under the great seal thereof, execute and deliver to the La Crosse and Milwaukee Railroad Company, whenever it shall, by virtue of the provisions of this charter, be entitled to any of said lands, a deed in fee simple of any and all the lands to which said company shall be entitled. Provided, that said company shall not sell any of said lands until twenty miles of said

road shall be completed, so as to admit of running regular trains over the the same, and so on, from time to time, so that the sales of lands by said company shall never exceed six sections of land for every mile of road so completed.

SEC. 5. The location and designation of the route and line of the said roads shall be made by the said La Crosse and Milwaukee Railroad Company, and the same shall from time to time, and as fast as practicable, be reported to the governor of the State. The selection of lands provided for in the act of Congress hereinbefore mentioned shall be made by such agents as may be appointed by the governor of the State. Such selection, as well as the survey, location, and completion of said roads, and the compensation of such agents, shall be at the cost and charge of said company, without charge of any kind upon the treasury of the State of Wisconsin. Said railroads which shall be constructed by the application of funds derived from the lands herein granted shall be and remain public highways for the use of the government of the United States, free from any toll or other charge upon the transportation of property or troops of the United States, and the United States mail shall be transported over said roads under the direction of the Post Office Department, as provided in said act of Congress.

SEC. 6. In consideration of the grants, privileges, and franchises herein conferred upon the said La Crosse and Milwaukee Railroad Company, for the purposes aforesaid, the said company shall, on or before the first day of March in each year, pay into the treasury of the State such sum as it is by the existing laws of the State required to pay in place of taxes upon its road now constructed, or which it may hereafter construct, under the present charter, and in addition thereto it shall pay into the treasury of the State, on or before the first day of March in each year, four per centum on the gross earnings of said road to be built by said company in pursuance of the power and authority conferred by this act, for the year ending on the last day of the preceding December, in place of taxes on that portion of its said railroad so to be constructed; and for the purpose of ascertaining the gross earnings aforesaid an accurate account of such earnings shall be kept by said company, an abstract whereof shall be furnished by said company to the treasurer of this State on or before the first day of February in each year, the truth of which abstract shall be verified by the affidavits of the treasurer and secretary of said company, and for the purpose of ascertaining the truth of such affidavits and the correctness of such abstracts full power is vested in the governor of this State, or any other person appointed, as may be by law prescribed, to examine the books and papers of said company, and to examine under oath the officers, agents, and employees of the said company and other persons; and if any person so examined by the goxernor, or other authorized person, shall knowingly or willfully swear falsely concerning the matter aforesaid, every such person is hereby declared to have committed perjury. And for securing to the State the payment of the aforesaid per centum, it is hereby declared that the State shall have a lien upon the railroad of the said company and upon all other property, estate, and effects of said company, whether real, personal, or mixed, and the lien hereby secured by the State shall take and have precedence of all demands, decrees, and judgments against the said company.

The first payment shall be made on the first day of March next, after fifty miles of said road shall be completed, and such payment shall be in lieu and in full of all claims of the State for the grant hereby made; and in consideration of such annual payment the said company shall be forever exempt from all assessments and taxes whatever by the State, or by any

county, town, city, village, or other municipal authority in the State, (except special taxes for the improvement of streets and sidewalks,) upon all stock in the said La Crosse and Milwaukee Railroad Company, whether belonging to said company or to individuals, or any of its franchises or estate, real, personal, or mixed, held by said company and necessary for the operation of said railroad. And said lands, granted by said act of Congress, and hereby authorized to be conveyed to the La Crosse and Milwaukee Railroad Company shall be exempt from taxation under and by virtue of the laws of this State for the period of ten years after the passage of this act, unless sooner sold, conveyed, or leased by the said La Crosse and Milwaukee Railroad Company. And the State shall have a prior lien upon the road of said company, and all the appurtenances and stock thereof, for all dues that may accrue to the State from said corporation as herein provided, which lien of the State shall take precedence of all demands, judgments, or decrees against said corporation.

SEC. 7. Within five years after the title of such lands shall become vested in the said railroad company, the same, if any shall remain unsold, shall be offered for sale in limited qualities at fair prices, preference being given to actual settlers.

SEC. 8. The said La Crosse and Milwaukee Railroad Company shall have full power and authority to transport persons or property in boats, vessels, barges, or other water craft, on any navigable water which any portion of their railroad may run to or connect with, and to receive and collect reasonable compensation for the same, and for that purpose may purchase or build and own such vessels, boats, barges, and other water craft as it may require.

SEC. 9. The said La Crosse and Milwaukee Railroad Company shall be capable in law of taking and holding any lands granted by the government of the United States or of this State to aid in the construction of railroads which shall be conveyed to said company by this act, or by deed, or by operation of law, and may also mortgage, or pledge, or otherwise dispose of all their right, title, claim, or demand of, in, or to any lands, or interest in lands, granted to said company by this act, and in any other estate, real, personal, or mixed, of which they may be seized at the time of execution of such mortgage, or which they may acquire subsequent thereto, in such manner and on such terms as the directors may think proper.

SEC. 10. In case the La Crosse and Milwaukee Railroad Company shall construct the railroad which by this act it is authorized to construct, or any part of it, upon or over any route upon or over which any other railroad company is authorized to construct a railroad, and upon or over which it has, previous to the passage of this act, actually surveyed or located its line of railroad, it shall be the duty of the La Crosse and Milwaukee Railroad Company to settle with such railroad company upon principles of justice and equity for all its property and rights of property which the said La Crosse and Milwaukee Railroad Company shall take, injure, or destroy, and the latter company shall pay to any such company whose property or rights of property shall be thus taken, injured, or destroyed, whatever the same is reasonably worth, such payment to be made in money, bonds, stock, or lands, or in such other manner as said companies shall mutually agree. And if the said companies cannot mutually agree upon the amount of compensation to be made by the said La Crosse and Milwaukee Railroad Company to such other company for the property and rights of property which said La Crosse and Milwaukee Railroad Company shall so as aforesaid take, injure, and destroy, then, and in that case, each of said companies shall select a disinterested engineer, and the two engineers so selected shall choose a third person, and in case they cannot agree upon such third person, the governor shall appoint

such third person; and the three persons so selected shall constitute a board of commissioners, whose duty it shall be to ascertain, determine, and award the amount of compensation which the said La Crosse and Milwaukee Railroad Company ought, in justice and equity, to make to such other railroad company for the property and rights of property which shall be so as aforesaid taken, injured, or destroyed.

SEC. 11. This act and all grants herein contained shall cease and be void unless the said La Crosse and Milwaukee Railroad Company shall accept of the same within five days after the passage of this act; and such acceptance shall be by a resolution adopted by the directors of said company, a copy of which, duly certified by the secretary of said company. under its corporate seal, within said period of five days from the passage of this act, shall be deposited in the office of the Secretary of State. And in case the said La Crosse and Milwaukee Railroad Company shall violate the provisions of this act, the legislature may repeal this act, and may revoke all and singular the rights and franchises herein conferred, so far as the same has not been performed and fulfilled, and so far as the rights and privileges hereby granted have not become complete and absolute.

SEC. 12. All the property which the said La Crosse and Milwaukee Railroad Company is authorized to appropriate, take, possess, hold, use, or enjoy, by making payment thereof, as is in this act provided, is hereby declared to be taken for public use, so soon as the said company shall so appropriate, take, possess, hold, or use the same.

SEC. 13. The capital stock of the La Crosse and Milwaukee Railroad Company is hereby increased two million dollars over and above its present capital, and within three months after the passage of this act said company shall open books for subscription to such increased capital stock, after giving at least thirty days' notice thereof in two newspapers, one published in the city of Milwaukee, and one published in the city of Madison. Such books shall be opened in the city of Milwaukee, and shall be kept open for not less than three days, and all persons shall be permitted to subscribe to said stock on the payment to the treasurer of the company of five per cent. of the amount subscribed in cash; but no one person shall be allowed to subscribe for more than two hundred and fifty shares of such stock; and in case the number of shares subscribed shall exceed the amount of two million of dollars, the same shall be reduced to that amount, by deducting such sums as may be necessary pro rata from each of the several subscriptions; and all of the shares of stock so subscribed shall be subject to calls for installments thereon in like manner as the other stock of the said railroad company.

SEC. 14. It is hereby declared that in the judgment of the legislature of this State, the objects of the corporation named in this act cannot be attained under or by general laws.

SEC. 15. The La Crosse and Milwaukee Railroad Company shall fence its road in parcels, as it shall from time to time operate the same, within one year after it shall commence the operating of any and every such parcel, until the whole of such railroad shall be in a good, proper, and substantial manner fenced throughout the entire extent thereof.

SEC. 16. This act is hereby declared to be a public act, and the same shall immediately after the passage thereof be printed by the State printer, and when thus published, shall take effect and be in force.

And whereas the said railroad company, after the passing of the last-mentioned act, and on the same day, duly accepted the same by a resolution adopted by the directors of said company, a copy of which, certified by the secretary of said company under its corporate seal, was on the same day deposited in the office of the secretary of state.

And whereas the said railroad company, for the purpose of providing for and securing the payment of its floating debt and for other purposes, had determined, before the date of the indenture hereinafter mentioned, dated June 21st, 1858, between said company, of the first part, and said Barnes, as trustee, of the second part, toi ssue its bonds for a sum not exceeding two millions of dollars in the aggregate, embracing one thousand bonds of one thousand dollars each, fourteen hundred bonds of five hundred dollars each, and three thousand bonds of one hundred dollars each, with interest warrants or coupons in the usual form attached.

And whereas, also, the La Crosse and Milwaukee Railroad Company executed and delivered to said party of the second part an indenture, dated on the 21st day of June, A. D. 1858, recorded in the office of the secretary of state of the State of Wisconsin, on the 8th day of July, A. D. 1858, in Book of Railroad Mortgages, on pages 342, 343, 344, 345, 346, 347, 348, by which the said railroad company conveyed to said William Barnes, party of the second part, as trustee for the holders of said bonds as therein particularly specified, all and singular the railroad of said company, commencing in the city of Milwaukee, and running from thence to La Crosse, a distance of about two hundred (200) miles, including all and singular the several tracts, pieces, or parcels of land which constituted or might thereafter constitute the site of the roadways, turn-outs, engine-houses, workshops, depots, and other buildings, and all other lands which might thereafter constitute or be a part of or appertain to said railroad, and also other property, real and personal, and other rights, privileges, liberties, and franchises, as by reference thereto will more fully and at large appear.

And whereas, also, the said indenture contained a covenant and agreement on the part of the said La Crosse and Milwaukee Railroad Company to make, execute, and deliver to said William Barnes, as trustee as aforesaid, all necessary and proper further conveyances and assurances.

And whereas the said trustee has required the execution aud delivery of this further conveyance:

Now, therefore, this indenture witnesseth, that the said La Crosse and Milwaukee Railroad Company, in consideration of the premises, and of the mutual promises herein contained, and the sum of one dollar, paid by the said party of the second part to said party of the first part, the receipt of which is hereby confessed and acknowledged, has granted, bargained, sold, conveyed, and confirmed, and does by these presents grant, bargain, sell, convey, and confirm, unto said party of the second part, all and singular the railroad of said company, commencing in the city of Milwaukee, and
27 running from thence to La Crosse, a distance of about two hundred (200) miles, and also the railroad of said company, commencing in the village of Madison, and running from thence, by the way of Portage City, to the St. Croix River or Lake, a distance of about two hundred and sixty-eight (268) miles, and also the railroad of said company, commencing in the village of Columbus, and running from thence to Portage City, a distance of about forty (40) miles, a part of which roads have been constructed and are now in full operation, and the residue are in process of construction, and all other railroads built or to be built and constructed by said company, or which they have a right to construct by or under any corporate or other rights, privileges, or franchises heretofore granted or given, or which may be hereafter granted or given to said La Crosse and Milwaukee R. R. Company, by the legislature of the State of Wisconsin, or from any other source, or in any other manner whatsoever, including all and singular the several tracts, pieces, or parcels of land which now are or hereafter may be or constitute the site of the roadways, turn outs, engine-houses, workshops, depots, and other buildings, and all other lands and

real estate which now constitute or may hereafter constitute, or be a part of or appertain to said railroads, and including also all and singular the lots, lands, and real estate whatsoever which the said railroad company now own, or which they shall hereafter acquire by purchase, grant, gift, or otherwise, in the cities of Milwaukee and La Crosse, or in the vicinity of either of said cities, and all improvements made or to be made thereon, and all rights of dockage and wharfage, and all other riparian rights, privileges, and franchises appertaining thereto; for a particular description of which lands, already acquired, reference is made to the various deeds of the same to the said company.

And also all and singular the superstructure of said railroads, whether now made or to be made hereafter, and all the engine-houses, workshops, depots, and other buildings, and all the other improvements on or appertaining to said railroads, whether now built or made, or to be built or made hereafter.

And also all and singular the locomotive engines and other rolling stock, and all the other equipments of every kind and description, which have already been or may hereafter be procured for or used on said railroads, and all the materials, tools, implements, and utensils, and other personal property which have been or may hereafter be procured for or used in connection with said railroads.

And also all and singular the rights, privileges, liberties, and franchises of said La Crosse and Milwaukee Railroad Company of every kind and description.

And also the said La Crosse and Milwaukee Railroad Company has granted, bargained, sold, conveyed, and confirmed, and does by these presents grant, bargain, sell, convey, and confirm, unto said party of the second part all and singular the lands granted, or intended to be granted, to said railroad company, under or by virtue of the act of Congress and the act of the legislature of the State of Wisconsin hereinbefore mentioned, together with all and singular the hereditaments and appurtenances belonging or in anywise appertaining to the lands and real estate hereby conveyed or intended to be conveyed.

And also all and singular the stock, railroad or other bonds, bills of exchange, promissory notes, accounts, causes of action, demands and choses in action of whatsoever nature which may be owned, or in which the said railroad company may have an interest on such day as the said railroad company may first make default in the payment of the interest or principal, or any part thereof, which may hereafter become due on any of the said bonds issued or to be issued by said company.

And it is hereby declared to be the intention of the parties to these presents to convey to and vest in said party of the second part all the property, real and person and mixed, of said railroad company, to be acquired or vested hereafter, as well as that which has been already acquired or vested, together with all the rights, liberties, privileges, and franchises of said railroad company, as fully and amply as the same might be conveyed if said railroads had already been fully built, constructed, and equipped, and the particular lands granted by the foregoing acts of Congress and the said legislature had already been fully designated and duly conveyed and duly patented to said railroad company according to the provisions of said acts.

And the said La Crosse and Milwaukee Railroad Company, part of the first part, does hereby covenant, grant, bargain, promise and agree to and with the said party of the second part, and his successors, grantees, and assigns, to warrant and forever defend the above described and granted premises, lands, tenements, and every part and parcel thereof, and also all the property, real, personal, and mixed, now vested or acquired, or hereafter to be vested

or acquired, and also all the rights, property, real, personal, and mixed, choses in action, privileges, and franchises above conveyed or intended to be conveyed, unto the said party of the second part, his successors, grantees, or assigns, against the said party of the first part, and against all and every other person or persons, States or corporations lawfully claiming or to claim the same or any part thereof, subject, nevertheless, to all legal lines already existing upon the property and franchies above mentioned.

To have and to hold all and singular the said property, real, personal, and mixed, and choses in action, with the hereditaments and appurtenances, and all and singular the rights, liberties, privileges, and franchises hereby conveyed or intended to be conveyed, subject to the aforesaid existing legal liens, to the aforesaid party of the second part, and his successors and his heirs and assigns forever.

In trust, nevertheless, and upon the trusts, terms, and conditions herein expressed, and also expressed in the said indenture made and executed by and between said parties on the 21st day of June, A. D. 1858.

First. Until default shall be made in the payment of said bonds, or some of them, or in the payment of the interest thereon, or some part thereof, and the said railroad company shall be suffered and permitted to hold and enjoy said railroads, with all the equipments and all other thing appertaining to the same, and to use the same, and to take and receive the profits thereof to its own use, in the same manner as though this deed had not been made.

Second. In case of default for the space of fifteen days shall be made in the payment of any of said interest-warrants or coupons as they respectively fall due, or if default for the like period shall be made in the pay-
28 ment at maturity of the principal sum of money mentioned in any of the said bonds, then, and in either of said cases, it shall be lawful, and said trustee is hereby authorized in his discretion, either in person or by his attorney or attorneys, agent or agents, to enter into and upon, and take possession of all and singular the railroads and all the other property, real, personal, and mixed, and choses in action hereinbefore conveyed, or intended to be conveyed, and to take and receive the income and profits thereof, and to take possession of all books, documents, maps, and papers relating thereto, and to sell all and singular said railroads and said other property, real, personal, and mixed, and choses in action, with all the rights, liberties, privileges, and franchises of said railroad company, either at public or private sale, and to execute and deliver to the purchaser or purchasers deeds and conveyances which shall vest in such purchaser or purchasers all the estate, right, title, and interest, whether legal or equitable, of said trustee and said railroad company, of, in, and to the said property, rights, liberties, privileges, and franchises, and every part and parcel thereof. But before any sale shall be made at auction, notice of such intended sale shall be published once in each week *for three weeks* at the least, in two newspapers published in the city of New York, and in a newspaper published in the city of Milwaukee, and should any further notice be *required by the laws of the State of Wisconsin, the same shall be given.* And in case default shall at any time be made in the payment of the interest-money of the bonds then outstanding, or in case default be made in the payment of the principal sum of money mentioned in said bonds, or any of them, at maturity, then and in either of said cases said trustee, on the written request of the holder or holders of bonds then outstanding to the amount in the aggregate of one hundred thousand dollars, shall proceed to make such sales and conveyances so as above mentioned.

Third. Said railroad company covenants and agrees to and with said trustee, and his successor, that said company will from time to time, during the continuance of the trust, make, execute, cause to be duly recorded, and

deliver to said trustee all such further conveyances and assurances, and will do all such further acts and things as may either be necessary or proper for more effectually vesting in said trustee all such right, title, interest, or estate, both legal and equitable, as said railroad company now has or may hereafter acquire of, in, or to all and every part of the property hereby conveyed or intended to be conveyed, together with the rights, liberties, privileges, and franchises aforesaid

Fourth. Said railroad company will cause this indenture to be duly recorded in all proper places, and will do whatever else may be necessary or proper to give full effect to this conveyance, and will pay and discharge all taxes, charges, liens, and other burdens which either exist or may hereafter arise or be imposed upon the property hereby conveyed or intended to be conveyed; and the trustee assumes no duty or responsibility on these subjects or any of them, nor in relation to any other matter or thing, except as herein provided.

Fifth. The trustee is hereby authorized to appoint all such attorneys, counsellors, clerks, and other agents in addition to those provided for in said original indenture executed by and between said parties on the 21st day of June, 1858, and recorded as above mentioned, as he may deem proper in the execution of the trust, and shall not be answerable for the defaults or other misconduct of said attorneys, counsellors, clerks, or other agents, unless chargeable with culpable negligence in their appointment; nor shall the trustee be responsible for anything short of gross negligence or wilful default in the discharge or omission to discharge of any of his duties.

And it is hereby expressly declared, covenanted, and agreed by the said railroad company that the provisions herein contained for the security of said bonds are in addition to the provisions, liens, and securities made or created in that behalf in the said original deed of trust or mortgage executed by and between said parties, bearing date June 21st, 1858, and recorded as aforesaid, and that all such original provisions, liens, and securities are to remain in full force and effect; and also that all provisions in said original deed of trust or mortgage for the benefit or protection of said trustee are to remain in full force and effect, and are to be applicable to all trusts and actions or omissions to act under this indenture in the same manner as if all the provision thereof had been inserted and incorporated in said original trust deed or mortgage.

Said trustee hereby accepts and covenants and agrees to and with said railroad company faithfully to execute said trust.

In witness whereof, said railroad company has hereto affixed its corporate seal, and caused the same to be subscribed by its president and secretary, and the trustee has subscribed his name and affixed his seal the day and year first above written.

La Crosse and Milwaukee Railroad Company, by—
N. P. STANTON, *President.*
LOCKWOOD L. DOTY, *Secretary.*
WILLIAM BARNES, *Trustee.* [SEAL.]

[Seal La Crosse and Milwaukee R. R. Company.]

Signed, sealed, executed, and delivered in our presence as to the La Crosse and Milwaukee Railroad Company, by N. P. Stanton, president.
BYRON KILBOURN.
T. W. BEAVER.

Signed, executed and delivered in our presence, as to Lockwood L. Doty, secretary of said La Crosse and Milwaukee Railroad Company.
EDWARD P. WHALING.
T. W. BEAVER.

Signed, sealed, executed, and delivered in our presence, as to William Barnes, the said trustee.

JOHN G. WHITE.
ISAAC EDWARDS.

29 STATE OF WISCONSIN, *County of Milwaukee, ss:*

Be it remembered, that on this twenty-fourth day of August, eighteen hundred and fifty-eight, before me personally appeared Nehemiah P. Stanton, described in and who executed the above instrument in writing as the president of and in behalf of the La Crosse and Milwaukee Railroad Company, and acknowledged that he executed the said instrument, as president as aforesaid, freely for the purposes therein stated; and I certify that the said person who made the said acknowledgment is personally known to me to be the individual described in and who executed the said instrument. And the said Nehemiah P. Stanton, being by me duly sworn, says that he is the president of the La Crosse and Miiwaukee Railroad Company, the above-named corporation, and that the seal affixed to the above instrument is the corporate seal of the said corporation, and that the said corporate seal and his signature were affixed to said instrument by the authority and direction of said corporation, and by order of the board of directors thereof.

In testimony whereof, I have hereunto set my hand and seal official, at my office No. Third street, in the city of Milwaukee, the day and year above written.
[SEAL.]

Given under my hand and official seal the day and year above written.

EDWARD P. WHALING,
Notary Public, Milwaukee County, Wisconsin.

STATE OF WISCONSIN, *County of Milwaukee, ss:*

Be it remembered, that on this 24th day of August, eighteen hundred and fifty-eight, before me personally appeared Lockwood L. Doty, to me well and personally known to be the person described in and who executed the above instrument in writing as secretary of and in behalf of the La Crosse and Milwaukee Railroad Company, and acknowledged that he executed the same freely and as the free act and deed of the said La Crosse and Milwaukee Railroad Company, for the uses and purposes therein mentioned; and the said Lockwood L. Doty, being by me duly sworn, says that he is the secretary of the La Crosse and Milwaukee Railroad Company, the above named corporation, and that the seal affixed to the above instrument is the corporate seal of the said corporation, and that the said corporate seal and his signature were affixed to said instrument by the authority and direction of said corporation, and by order of the board of directors thereof.

In testimony whereof, I have hereunto set my hand and seal official, at my office No. Third street, in the city of Milwaukee, the day and year above written.
[SEAL.]

Given under my hand and official seal the day and year above written.

EDWARD P. WHALING,
Notary Public, Milwaukee County, Wisconsin.

STATE OF NEW YORK, *County of Albany, ss:*

Be it remembered, that on the sixteenth day of August, in the year one thousand eight hundred and fifty-eight, before me, the subscriber, a commissioner in and for said State, appointed by the governor of the State of Wisconsin, to take the acknowledgment and proof of the execution of deeds or other conveyances or leases, and of any contract, letter of attorney, or other writing under seal or not, administer oaths, and take and certify depo-

sitions to be used or recorded in the said State of Wisconsin, appeared William Barnes, described in and who executed the above instrument of writing between him, as one of the parties thereto, and the La Crosse and Milwaukee Railroad Company, the other party thereto, and the said William Barnes acknowledged that he executed the said instrument freely for the purposes therein stated; and I certify the said person who made the said acknowledgment is personally known to me to be the individual described in and who executed the said instrument.

In testimony whereof, I have hereunto set my hand and seal official, at my office No. seventy-one State street, in the city of Albany, the day and year first above written. [SEAL.]

Given under my hand and official seal the day and year above written.

EDWARD WADE,
Commissioner of the State of Wisconsin in and for the State of New York.

Recorded Sept. 1st, 1858, at 8 o'clock a. m.

30 EXHIBIT No. 3.

Lease.—The La Crosse and Milwaukee Railroad Company to Selah Chamberlain.

Articles of agreement made and entered into by and between the La Crosse and Milwaukee Railroad Company, a corporation duly created and existing under and by virtue of the laws of the State of Wisconsin, party of the first part, and Selah Chamberlain, of the city of Cleveland, and State of Ohio, party of the second part, at the city of Milwaukee and State of Wisconsin, the twenty-sixth day of September, in the year of our Lord one thousand eight hundred and fifty-seven.

The said party of the first part, in consideration of the undertakings and agreements of the said party of the second part, hereinafter contained, hereby sells and conveys to the said party of the second part all its personal property of every name, kind, and description, in the State of Wisconsin, except all such personal property as is used in and is appurtenant to the operation of the Watertown division of the La Crosse and Milwaukee railroad, of which said property an inventory and schedule shall be made and attached hereto so soon as the same can be conveniently done.

And the said party of the first part, in consideration of the said undertakings and agreements of the said party of the second part, hereby leases and lets to the said party of the second part, from and after the thirtieth day of September, in the year 1857, for an indefinite term of time, to be determined in the manner hereinafter specified, its entire railroad and railroad route from the city of Milwaukee, by way of Horicon and Portage City, to the city of La Crosse, together with its right of way, depot grounds, and all buildings, tenements, and fixtures of whatsoever kind and description connected therewith or appurtenant thereto, together with all estate, rights, privileges, and appurtenances and franchises connected therewith or belonging or incident thereto, subject only to such prior and superior liens as may or do exist thereon, and all existing contracts and agreements with any other company whose railroad connects with the La Crosse and Milwaukee railroad.

It is mutually agreed that the said party of the second part shall from and after the said thirtieth day of September, and until this agreement shall be terminated in the manner hereinafter provided, operate so much of the said railroad as is ready for operation, and from time to time such portions of the same as shall be made ready for operation in such manner as will produce

the largest amount of nett receipts; that the said party of the second part shall, during the term aforesaid, keep the said road and all the rolling stock upon the same in good and thorough repair; and that the said party of the second part shall receive and appropriate, in the manner hereinafter
31 provided, all the receipts or income to be derived from the operation of said railroad.

It is further mutually agreed that the said party of the second part may, if it shall be found for the interest of said company, buy additional rolling stock, and appropriate the receipts of said railroad to the payment of the same.

The said party of the second part hereby undertakes and agrees that he will defray all the current cost and expenses of keeping said railroad and rolling stock in good and thorough repair, and all the cost and expenses of operating the said railroad, and that he will, by the fifteenth day of every month, make out and deliver to said party of the first part a correct statement exhibiting the total receipts and income of said railroad, from all sources, during the next preceding month; also the cost and expenses, during such month, of rolling stock purchased and of keeping said railroad and rolling stock in repair, and the cost and expense of operating said railroad, and also exhibiting the nett receipts from said railroad, after deducting such cost and expense of rolling stock and repairs and of operating, and that he will at any time, on demand of said company, or its president or secretary, furnish to the person demanding the same a statement in detail of the items of which such statement is composed; and any officer or agent of said company, authorised by said company to do so, shall, at any time, have the right to examine the accounts of said party of the second part relating to the repairs of said railroad and rolling stock and to the operating of said railroad.

And the said party of the second part further undertakes and agrees that the said nett receipts, after deducting the cost and expenses of repairs and operating, as exhibited by the said monthly statements as aforesaid, shall be appropriated by him in the manner following, to wit:

1. To the payment of all coupons hereafter to become due upon nine hundred and fifty thousand dollars of the bonds of said company, secured by a first mortgage or deed of trust of said railroad from Milwaukee to Portage City, bearing date June 13th, A. D. 1854, together with the sinking fund provided for by a supplemental mortgage or deed of trust, bearing date February 18, 1856, except such of said coupons as are payable November 1st, 1857, and the sinking fund of twelve thousand dollars, payable November 1, 1857.

2. To the payment of all coupons hereafter to become due on one hundred and fourteen thousand dollars of bonds of the city of Milwaukee, issued to the Milwaukee, Fond du Lac, and Green Bay Railroad Company, secured by a second mortgage or deed of trust on a part of said railroad, which mortgage or deed of trust bears date on the first day of September, A. D. 1853.

3. To the payment of all coupons hereafter to become due on two hundred thousand dollars of the bonds of the city of Milwaukee, issued to the
32 La Crosse and Milwaukee Railroad Company, secured by a second mortgage or deed of trust on the part of said railroad, which mortgage or deed of trust bears date the thirtieth day of July, A. D. 1854.

4. To the payment of all coupons hereafter to become due on one million of dollars of the bonds of the said railroad company, secured by mortgage or deed of trust on the railroad of said company from Milwaukee to Portage City, and from Watertown to Midland, bearing date the day of , A. D. 1857.

5. Whatever balance of said nett receipts, as aforesaid, shall remain after the payment of the said coupons and sinking fund shall be applied by said

party of the second part in payment of the amount due, or hereafter to become due, to him by virtue, either of a certain contract between said parties, dated January twentieth, 1857, a supplemental contract between said parties, dated April 30th, 1857, or a certain contract between said parties, dated November 20th, 1856, or of a contract modifying said contract, entered into between the said parties simultaneously with this contract, except such as may become due for work which shall be hereafter done, between New Lisbon and La Crosse, which is to be paid for from the means of the said company other than the said income.

And the said party of the second part further undertakes and agrees that whenever he shall have received from the earnings of the said railroad such sum, as by the terms and conditions of the aforesaid contract for the construction of the said railroad, bearing date respectively November 20th, 1856, January 20th, 1857, April 30th, 1857, and the one entered into simultaneously herewith, he is or shall be entitled to receive, or whenever at any time the said party of the first part shall pay to him any balance which at such time he shall be entitled to receive, according to the terms and conditions of the said contract, that he will surrender up to the said party of the first part the quiet and peaceable possession of the whole and every part of the said railroad, together with its right of way, depot grounds, and all buildings, tenements, and fixtures of whatsoever kind or description, connected therewith, or appertaining thereto, in good repair, together with all estate, rights, privileges, franchises, and appurtenances connected therewith or belonging or incidental thereto, including all the railroad buildings, tenements, fixtures, and appurtenances constructed, and all rolling stock and other personal property put upon said road by said party of the second part, by virtue of this contract, and that he will reconvey and deliver to said party of the first part all personal property hereby conveyed which shall not have been worn out, destroyed, or consumed in the construction or operation of the said railroad, and that he will convey and deliver to said party of the first part all personal property which shall have been acquired for said railroad in pursuance of this contract, or with the means derived from the receipts from raid railroad, and that he will, at such time,
33 deliver on the line of said railroad, to said party of the first part, fifteen thousand cords of wood, and that whenever the said party of the second part shall have received, as aforesaid, such sum as he shall be entitled to, as aforesaid, or whenever such balance shall be paid as aforesaid, this contract shall cease and determine, and from thenceforth it shall be null and void.

In witness whereof, the said party of the first part hath caused these presents to be signed by its president and secretary, and its corporate seal to be hereunto affixed, and the same are signed by the said party of the second part.

La Crosse and Milwaukee Railroad Company, by—

(Signed) BYRON KILBOURN, *President.*

[L. S.] JACKSON HADLEY, *Secretary.*

S. CHAMBERLAIN. [L. S.]

Signed, sealed, and delivered in the presence of—

H. L. PALMER.

THOMAS W. BEAVER.

STATE OF WISCONSIN, *Milwaukee County, ss:*

Be it remembered, that on this twenty-sixth day of September, in the year one thousand eight hundred and fifty-seven, before the subscriber, a notary public residing in the city of Milwaukee, personally appeared Byron Kil-

bourn, to me known, who, being by me duly sworn, said that he resides in the city of Milwaukee, Wisconsin; that he is the president of the La Crosse and Milwaukee Railroad Company; that the seal affixed to the annexed instrument is the common and corporate seal of the said company, and was affixed thereto by their authority; and that he, as president, and Jackson Hadley, as secretary, subscribed their names thereto by like authority; and on the same day before me personally appeared Selah Chamberlain, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that be executed the same freely for the uses and purposes therein mentioned.

(Signed) H. L. PALMER,
Notary Public, Milwaukee County.

Contract.

La Crosse and Milwaukee Railroad Company with Selah Chamberlain. Copy from directors' minutes.

Resolved, that a contract be entered into with Selah Chamberlain, which shall be signed by the president and secretary, and sealed with the corporate seal of the company, in the words and figures following, to wit:

This indenture, made and entered into this twenty-sixth day of September, in the year of our Lord one thousand eight hundred and fifty-seven, by and between the La Crosse and Milwaukee Railroad Company, a corporation duly created and existing under and by virtue of the laws of the
34 State of Wisconsin, party of the first part, and Selah Chamberlain, of the city of Cleveland, and State of Ohio, party of the second part, witnesseth, that the said parties have mutually undertaken and agreed, and by these presents do undertake and agree, to and with each other, that the contract heretofore entered into between the said parties for the construction of the western division of the La Crosse and Milwaukee railroad, from Portage City to La Crosse, excepting the bridge across the Wisconsin River at Kilbourn City, and which contract bears date the 20th of January, A. D. 1857, and the supplemental contract entered into between the same parties, and bearing date the 30th day of April, A. D. 1857, shall be, and the same are hereby, modified as follows, to wit:

The said party of the second part shall proceed to complete the construction of said railroad as far as the depot at New Lisbon, in the county of Juneau, with reasonable dispatch, and by the first day of December next.

The time for completing the said railroad from New Lisbon to La Crosse is extended indefinitely, and the said party of the second part shall construct the said railroad between the two last-named points as fast as and no faster than the said party of the first part shall be prepared and ready to pay the said party of the second part for the same in cash, or monthly estimates, according to the terms and stipulations of the aforesaid contract.

The contract entered into by and between said parties on the 20th day of November, A. D. 1856, for the ballasting that portion of the La Crosse and Milwaukee railroad extending from Beaver Dam to Portage City is hereby so modified that the said party of the first part shall not provide or furnish the motive power and cars requisite for doing said work, but that the motive power so used shall be a part of that specified in a contract between said parties entered into simultaneously with this contract for the leasing of said road, and that said party of the second part shall, for all ballasting which he shall do on said railroad between Milwaukee and Beaver Dam, under the direction and by order of the chief engineer of said company, be paid at the rate of fifty cents per cubic yard, to be measured in the gravel pit from whence the material shall be taken.

In consideration of the aforesaid extension of the time of constructing the said railroad from New Lisbon to Portage City, and of the damages which the said party of the second part will sustain by reason of such extension and by loss, as teams, material, tools, machinery, and in other ways, and also in consideration of the mode in which the said party of the second part is to be paid the amount now due to him and the amount to become due to him for finishing said railroad to New Lisbon, and in consideration of the failures and delays of the said party of the first part in making payments to the said party of the second part upon estimates heretofore due, and in further consideration of the services, risks, and personal expenses of the said party of the second part in the operation and management of said railroad as hereinafter referred to, and more particularly set forth in said contract of lease, the said party of the first part hereby agrees to pay to the said party of the second part the liquidated sum of two hundred thousand dollars, which sum is mutually agreed upon by said parties as an equivalent for the aforesaid consideration.

It is further stipulated and agreed that by or before the twentieth day of October, A. D. 1857, a full and correct statement shall be made out of the amounts due to the said party of the second part on the 30th day of September, 1857, under and by virtue of the said contract of January 20th, 1857, April 30th, 1857, and November 20th, 1856, which sum, together with the aforesaid sum of two hundred thousand dollars, ($200,000,) shall be the balance due to the said party of the second part, on the 1st day of October, 1857, and shall be charged by said party of the second part to the said party of the first part, and on the first day of every month thereafter the said party of the second part shall charge the said party of the first part with the amount which shall be due under or by virtue of either of said contracts, or this contract, in constructing the said railroad between Portage City and New Lisbon, or in ballasting between Milwaukee and Portage City, and shall credit said party of the first part with such sum as the said party of the first part shall be entitled to receive from the net earnings of the said railroad by virtue of the said contract of lease entered into between said parties, simultaneously with these presents.

It is further agreed between the said parties that on the first day of July, 1858, and on the first day of each July and each January thereafter, a semi-annual statement of the accounts between said parties shall be made out, in which interest shall be computed up to the day of making out such accounts, at the rate of twelve per cent. per annum.

It is further agreed between the said parties, whatever sums shall hereafter become due to said party of the second part, for any work done on the construction of said railroad, between New Lisbon and La Crosse, shall be paid to him by said party of the first part from the means of said company derived fuom other sources than the income of said railroad.

In witness whereof, the said party of the first part has caused these presents to be signed by its president and secretary and the corporate seal of said company to be affixed thereto, and the said party of the second part has affixed his signature and seal the day and year first above written.

La Crosse and Milwaukee Railroad Company, by—

[SEAL.] (Signed) BYRON KILBOURN, *President.*
JACKSON HADLEY, *Secretary.*
S. CHAMBERLAIN. [L. S.]

LA CROSSE AND MILWAUKEE R. R. Co.,
Secretary's Office, Milwaukee, April 23, 1858.

I hereby certify that the foregoing resolution is a true copy of a resolution adopted by the board of directors of this company at a special meet-

ing held at Milwaukee on the 26th day of September, 1857, and that the preceding contract is a true and correct copy of and the whole of the contract therein referred to, as appears from the recorded minutes.

RICHARD DOTY, *Secretary.*

EXHIBIT No. 4.

UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

At a stated term of the district court of the United States of America for the district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district of Wisconsin, on the first Monday (being the third day) of January, A. D. 1859. Present: The Honorable Andrew G. Miller, judge of said court, presiding.

On the twenty-first day of the said term, to wit, on the eleventh day of February, A. D. 1859, the following proceedings were had, to wit :

NEWCOMB CLEVELAND
vs.
THE LA CROSSE AND MILWAUKEE RAILROAD COMPANY, BYRON KILBOURN, MOSES KNEELAND, JAMES LUDINGTON, D. C. FREEMAN, and SELAH CHAMBERLAIN. } In equity.

This day came the parties by their counsel, and on due consideration of the pleadings, proofs, and arguments of counsel, it is thereupon ordered, adjudged, and decreed by the court that the article of agreement between the La Crosse and Milwaukee Railroad Company and Selah Chamberlain, bearing date the twenty-sixth day of September, eighteen hundred and fifty-seven, whereby said company sold and assigned to said Chamberlain all its personal property, (except such as is used on the Milwaukee and Watertown division of said railroad,) and leased to said Chamberlain their said railroad and appurtenances, rights, franchises, and privileges, be, and hereby is, vacated, annulled, and made void, so that the same shall not hereafter be of any force or effect whatever.

And that the said Selah Chamberlain be, and hereby is, perpetually enjoined and restrained from using, managing, running, controlling, or meddling with said railroad, or the rolling stock, personal property, or any of its appurtenances, or franchises, or anything connected therewith, under or by virtue of said article of agreement.

And it is further ordered, adjudged, and decreed by the court that the judgment of the said Selah Chamberlain against the La Crosse and Milwaukee Railroad Company, entered in this court on the second day of October, eighteen hundred and fifty-seven, for the sum of six hundred and twenty-nine thousand and eighty-nine dollars and seventy-two cents, and all executions and proceedings thereon, be, and hereby are, vacated, annulled, made void, and set aside, so that the same shall have no further effect whatever.

And it is further ordered, adjudged, and decreed by the court that the said defendant, Selah Chamberlain, pay the costs to be taxed, so far as they accrued in this proceeding against him, and that he pay the same within twenty days, or, in default thereof, an execution be issued against him for the same.

And as the lease and assignment of the said company to D. C. Freeman has expired by its own limitation, it is further ordered, adjudged, and decreed by the court that the defendant, D. C. Freeman, pay the costs to be taxed, so far as they accrued in this proceeding against him, within twenty days, or, in default thereof, an execution be issued against him for the same.

And it is further ordered, adjudged, and decreed by the court that the La Crosse and Milwaukee Railroad Company pay the costs to be taxed, so far as they accrued in this proceeding against it, within twenty days, or, in default thereof, an execution be issued against it for the same.

And it is further ordered that reference be, and hereby is, made to a master of this court to ascertain and report the annual income of the several lots described in the bill, as having been conveyed to Moses Kneeland and James Ludington from the time of their said purchase, together with a statement of the interest thereon, and also to ascertain and report the amount of the actual cost of permanent improvements made on said lots, by said Kneeland and Ludington, together with interest thereon, and also the amount of liens and taxes on said lots that have been paid by said Kneeland and Ludington, or by C. D. Nash for them, together with interest on the same. And that this bill be retained for further decree and proceedings after the coming in of said report.

It is ordered by the court that in case of appeal by the La Crosse and Milwaukee Railroad Company and Selah Chamberlain, or either of them, a bond to authorize a supersedeas shall be given, and filed with sufficient sureties, to be approved by the court or judge, in the penal sum of one hundred and fifty thousand dollars.

A. G. MILLER.

39 Whereupon a subpœna issued, returnable the first Monday of August then next ensuing, to wit:

Subpœna.

UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

[SEAL.] The President of the United States of America to Selah Chamberlain, greeting:

[5-cent in. rev. stamp.]

You are hereby commanded that you personally appear before the judges of the circuit court of the United States of America for the district of Wisconsin, in our court of chancery in and for the district aforesaid, on the first Monday of August next ensuing, at Milwaukee, to answer to a bill of complaint exhibited against you in our said court by the Milwaukee and Minnesota Railroad Company, and to do further, and receive what our said court shall have considered in that behalf; and this you are not to omit under the penalty which may ensue.

This process of subpœna is directed to the marshal of this district, who is hereby commanded to serve the same upon the said Selah Chamberlain if to be found in his district, and due return thereof make.

Witness the Honorable Roger B. Taney, chief justice of the Su-
40 preme Court of the United States, at the city of Milwaukee, in the said district, this twenty-ninth day of June, in the year of our Lord one thousand eight hundred and sixty-three, and of our independence the eighty seventh.

J. M. MILLER, *Clerk.*

MAT. H. CARPENTER, *Solicitor.*

It is ordered by our said court that the said Selah Chamberlain, the defendant aforesaid, do enter his appearance in this suit in the clerk's office, on or before the day and time at which this subpœna is returnable as aforesaid; otherwise the bill filed may be taken as confessed.

Filed July 3, 1863.

Return.

And afterwards, and on or before the return day of said subpœna, came the said marshal and returned the same with his return endorsed thereon in writing, as follows:

Served on the within-named Selah Chamberlain by delivering him personally a copy of this subpœna, this 29th day of June, 1863.

D. C. JACKSON, *Marshal,*
By W. S. JACKSON, *Deputy.*

Rule to plead.

And afterwards, to wit, on the third day of August, A. D. 1863,
41 came the complainant, by its solicitor, and entered in the order and rule book a rule on the defendant to plead, as follows:

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY
vs.
SELAH CHAMBERLAIN.

AUGUST 3, 1863.

On motion of M. H. Carpenter, solicitor for the complainant, ordered, that the defendant appear and plead, answer, or demur to the bill of complaint in this cause on or before the first Monday of September, A. D. 1863, or said bill will be taken as confessed.

Demurrer.

And afterwards, to wit, on the eighteenth day of September, A. D. 1863, came the said defendant by Wm. P. Lynde and J. H. Van Dyke, esq'rs, and filed his demurrer to said bill of complaint as follows:

The demurrer of Selah Chamberlain, one of the defendants, to the bill of complaint of the Milwaukee and Minnesota Railroad Company, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters in the said complainants' bill to be true in such manner or form as the same are therein set forth and alleged, doth demur
42 thereto, and for cause of demurrer showeth that the said complainant hath not in and by said bill made or stated such a case as doth or ought to entitle the complainant to any such relief as is thereby sought and prayed for from and against this defendant; wherefore this defendant demands the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill or any of the matters therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

WM. P. LYNDE,
J. H. VAN DYKE, *Solicitors.*
N. J. EMMONS, *of Counsel.*

DISTRICT OF WISCONSIN, *ss:*

Selah Chamberlain, of the city of Cleveland and State of Ohio, being duly sworn, says that he is the defendant named in the foregoing demurrer, and he further says that said demurrer is not interposed for delay.

S. CHAMBERLAIN.

Sworn before me September 18th, 1863.

J. M. MILLER, *Clerk.*

[Stamp.]

I certify that in my opinion the foregoing demurrer of Selah Chamberlain, defendant, is well founded in point of law.

N. J. EMMONS, *of Counsel.*

Demurrer set down for argument.

And afterwards, on the 4th day of April, A. D. 1864, came the complainant by Matt. H. Carpenter, its solicitor, and on his motion it is ordered that the demurrer of the defendant be set down for argument on the third
43 Monday in April, A. D. 1864.

And afterwards, on the 28th day of April, A. D. 1864, came the parties by their counsel in open court, and this cause came on to be heard on the demurrer of the defendant to the complainant's bill, and was submitted by counsel without argument; and in consideration thereof it is ordered by the court that said demurrer be, and the same hereby is, sustained. And it is further ordered, adjudged, and decreed by the said court that the complainant's bill be, and the same is, dismissed at the costs of the complainant.

And came the complainants by its counsel on the same day, in open court, and prayed an appeal to the Supreme Court of the United States.

Whereupon it is ordered by the court that the said appeal be allowed upon the said complainant giving bond, with sufficient sureties, in the penalty of two hundred and fifty dollars, to be approved by the court or a judge thereof.

And afterwards, to wit, on the 4th day of May, A. D. 1864, came the said complainant, the Milwaukee and Minnesota Railr'd Company, and filed its bond with sureties to perfect said appeal, which bond was then and there duly approved, as follows:

44 *Bond.*

Circuit court of the United States for the 9th circuit and district of Wisconsin.

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY, compl't,
vs.
SELAH CHAMBERLAIN, def't.

Know all men by these presents that the Milwaukee and Minnesota Railroad Company, as principal, and Austin Gunnison and Josiah A. Noonan, as sureties, are held and firmly bound unto Selah Chamberlain in the just and full sum of five hundred dollars lawful money of the United States, for the payment of which, well and truly to be made, we, and each of us, hereby bind ourselves, our successors and legal representatives, firmly by these presents. Dated, signed, sealed, and delivered this 30th day of April, A. D. 1864. Provided, however, that the condition of this bond is such that whereas the said Milwaukee and Minnesota Railroad Company has appealed to the Supreme Court of the United States for an order and decree made by the circuit court of the United States for the 9th circuit and district of Wisconsin, in equity, in a certain cause pending in said circuit court in favor of said company, complainant, and the said Chamberlain, defendant, sustaining the demurrer of the said defendant to the bill of complaint of said
45 complainant, and dismissing said bill of complaint, on the 28th day of April, A. D. 1864:

Now the condition of this obligation is such that if the said Milwaukee and Minnesota Railroad Company shall prosecute its said appeal to effect, and answer all costs if it shall fail to make good its appeal, then this obli-

gation shall be void; otherwise, the same shall be and remain in full force and virtue.

The Milwaukee and Minnesota Railroad Company, by—

DWIGHT W. KEYES, [SEAL.]
Secretary of said Company.
AUSTIN GUNNISON. [SEAL.]
J. A. NOONAN. [SEAL.]

DISTRICT OF WISCONSIN, *ss:*

Austin Gunnison, being first duly sworn, on oath says that he signed and sealed the foregoing bond; that he is worth more than one thousand dollars over and above all liabilities and exemptions of property from forced sale on execution; and that he is a resident and freeholder in the State of Wisconsin.

AUSTIN GUNNISON.

Subscribed and sworn to before me this 4th day of May, A. D.
46 1864.

GEO. C. KLEPSER,
Notary Public, Milwaukee Co., Wis.

[Revenue stamp.]

DISTRICT OF WISCONSIN, *ss:*

Josiah A. Noonan, being first duly sworn, on oath says that he signed and sealed the foregoing bond; that he is a resident and freeholder in the State of Wisconsin; and that he is worth one thousand dollars over and above all indebtedness and exemptions of property from forced sale on execution.

J. A. NOONAN.

Subscribed and sworn to before me this 4th day of May, A. D. 1864.

GEO. C. KLEPSER,
Notary Public, Milwaukee Co., Wis.

[Revenue stamp.]

I hereby approve this bond, and the sureties thereto, dated May 4, 1864.

A. G. MILLER, *District Judge.*

47 UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

I, A. Scott Sloan, clerk of the circuit court of the United States of America for the 9th circuit and district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and that they are true copies of their respective originals now on file and remaining of record in my office, being a full and complete exemplification of the record and proceedings in the suit the Milwaukee and Minnesota Railroad Company, complainant, against Selah Chamberlain, defendant, in said court.

In testimony whereof, I have hereunto set my hand and duly affixed the [SEAL.] seal of the said court, at the city of Milwaukee, in said district of Wisconsin, this 4th day of May, A. D. 1864, and of the independence of the United States the eighty-eighth.

Fees, $23 50.

A. SCOTT SLOAN, *Clerk.*

Filed May 14, 1864.

1043

Supreme Court of the United States.

No. 151, December Term, 1865.

THE MILWAUKEE AND MINNESOTA R. R. CO.,

Complainant and Appellant,

vs.

SELAH CHAMBERLAIN.

BRIEF FOR APPELLANT.

MATT. H. CARPENTER,

Counsel.

Starr & Son, Law Printers, Milwaukee.

Supreme Court of the United States.

No. 151, DECEMBER TERM 1865.

THE MILWAUKEE AND MINNESOTA RAILROAD COMPANY,

Appellant,

vs.

SELAH CHAMBERLAIN.

This an appeal from a decree of the Court below sustaining a demurrer to the bill of complainant and dismissing the bill.

The allegations of the bill confessed by the demurrer are as follows:

That in June 1858, the La Crosse and Milwaukee Railroad Company, mortgaged its railroad, rolling stock, franchises, &c., to Wm. Barnes,

to secure $2,000,000, bonds; that the mortgage was foreclosed June 21, 1859, by sale, and the purchasers organized the Milwaukee and Minnesota Company, under the laws of Wisconsin, in that behalf, to take and operate the road and franchises; and that thereupon that Company became the owner of the property and franchises, subject to all prior legal liens.

That prior to the mortgage to Barnes, the La Crosse Company, on the 26th day of September, 1857, was greatly embarrassed, and in failing circumstances; and that attachment suits had been and were being commenced against the Company; that the Company was unable to pay its debts and prosecute the completion of its road; "and that the Company then and there designing and intending to hinder, delay "and defraud its creditors, and to hold its creditors at defiance, and "apply its revenue and means to the completion of its road, did pre- "tend to make, and in form did, make, execute and deliver to said "Selah Chamberlain a pretended deed or lease," copy of which is attached as an exhibit—Record, p. 2, and R. p. 7. The bill avers that the Company had no legal power to make the lease, and it was for that reason null and void. And that said company on the same day entered into a written contract with Chamberlain to complete its railroad for the benefit of company; and the lease authorized him to apply the earnings of the road to the payment of what should become due to him, under said contract.

That afterwards, on the 2d day of October, 1857, the Company and Chamberlain, "fearing and being advised by counsel of the said "Chamberlain that there was some doubt whether the said fraudulent "purposes, designs and intentions of the said Company, and the said "Chamberlain could be accomplished under and by said deed or lease," &c., the said Company and said Chamberlain "did on that day "further combine and confederate together to hinder, delay and "defraud the creditors of the said Company," &c., "and did then "and there agree that said Company should, and said Company then "and there did, confess and suffer a judgment against it and in favor of "said Chamberlain in the District Court of the United States for the "District of Wisconsin, without service of process or suit brought "for" $629,089.72; and "that said Company, when it confessed and "suffered said judgment to pass as aforesaid, was not indebted to the

"said Chamberlain in any considerable amount," and "that said "indebtedness was less than $50,000;" that said Company never received any consideration for said judgment, except said indebtedness; "and that said judgment was only confessed by said Company in "pursuance of said unlawful combination and confederacy between "said Company and said Chamberlain, and for the purpose of "bolstering up said fraudulent deed or lease, and for the purpose and "with the intent and design on the part of said Company, and its "board of directors, and the said Chamberlain to thereby hinder, "delay and defraud the creditors of said Company," &c.

That said lease, apart from the design with which it was executed, did in fact, in its practical operations hinder and delay creditors unreasonably; and created and continued trusts in favor of said company to an unlimited amount; and enabled the company to prosecute its business, and apply the earnings of its road to its completion in defiance of creditors

That Chamberlain immediately after the execution of said lease entered into possession under it.

That on the 3d day of October 1857, one Newcomb Cleaveland obtained a judgment in said District Court, against said company for over one hundred thousand dollars, issued execution thereon, and levied on the railroad and property covered by the lease to Chamberlain. That afterwards said Cleveland exhibited his bill of complaint against said Company and said Chamberlain, copy of which is attached, (Record p. 11,) and shows (Record p. 14,) that the Cleveland bill sought to set aside the Chamberlain lease and judgment, upon two grounds:

(1) that the lease was executed without authority by the company and was therefore *ultra vires* and void.

(2) that it was given to defraud creditors, and was therefore void; and that the judgment was equally void. R. p. 15, 16.

That upon this Cleveland bill, a final hearing was had on the merits and the Court rendered a decree, copy of which is set forth (Record p. 10,) and shows that the decree did not merely declare the lease and judgment void as to creditors; did not postpone the lease and judgment as to creditors, leaving them in full force *inter se se;* but that the Court absolutely annulled the lease and vacated the judgment *inter se se* and as to all the world; so that Chamberlain can no longer claim any

right under said lease or even as against the Company, and he was expressly perpetually enjoined from so doing.

That after said decree was rendered said Chamberlain purchased said Cleveland judgment. Record p. 7.

That after the decree and in open violation of the perpetual injunction therein contained; the said Chamberlain remained in possession and thereafter received of the revenues of the road over two hundred thousand dollars, which he has never accounted for to the old company or to the Minnesota Company. Record p. 8.

That the said Cleveland judgment remains unsatisfied of record, "*and is an apparent* lien, charge, and incumbrance upon the railroad "&c., now owned by your orator, prior to the right and title of your "orator thereto: but that same ought in equity to be cancelled by an "application of the amount thereof from the monies so recovered by "said Chamberlain after the rendition of said decree. Record p. 8.

The bill prays an accounting, an application of said monies received to the satisfaction of the judgment, and that the judgment may be satisfied, and offers to pay any deficiency.

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1. If the Cleveland judgment be held to be a lien upon the railroad, rolling stock and franchises of the La Crosse company, now owned by the Minnesota company, then certainly the Minnesota company is interested in its cancellation, and has a right to insist that the money received by Chamberlain from the earnings of the road after the vacation of his lease and judgment should be applied to its satisfaction:

2. If the Cleveland judgment be held not a lien, yet the Minnesota Company, is clearly entitled to an accounting as to the funds received by Chamberlain after June 21, 1859, the day when the railroad and property passed to the Minnesota Company, at the foreclosure sale under the Barnes mortgage, and the necessity for an accounting gives a court of equity jurisdiction;

Unless Chamberlain can defend himself under his lease and judgment.

We assail the lease and judgment when the following grounds:

(1). The lease was given, and the judgment confessed with the intention to thereby hinder, delay and defraud the creditors of the Company; both are therefore void as to creditors prior and subsequent, and as to all subsequent purchasers.

(2). The lease is void in that it does in facts, and by its terms unreasonably hinder, delay creditors, and reserve trusts in favor of the company in defiance of its creditors and is therefore void, apart from the intention in fact, with which it was executed.

(3). The lease was given without authority of law, and is therefore *ultra vires* and void.

(4.) The lease was absolutely *annullad* and the judment absolutely *vacated*, by the Cleveland decree.

These propositions, I shall argue in the inverse order of their statement above.

I.

By the Cleveland decree, the Chamberlain lease and judgment were absolutely vacated so that thereafter Chamberlain was not a lien creditor, even as aganst the Company itself.

The Cleveland decree was not one merely postponing the lease and judgment of Chamberlain as to other creditors; it absolutely annulled the lease and vacated the judgment. The language of the decree is as follows:

"It is ordered, adjudged and decreed by the Court that the article of "agreement" [the lease] "be and hereby is vacated, annulled and made "void, so that the same shall not hereafter be of any force or effect "whatever."

"And that the said Chamberlain be and hereby is perpetually enjoined "and restrained from using, managing running, controlling, or meddling "with said railroad, or the rolling stock, personal property, or any of its "appurtenances or franchises, or anything connected therewith, under "or by virtue of said article of agreement.

"And it is further ordered, adjudged and decreed by the Court, that "the judgment of the said Selah Chamberlain against the La Crosse & "Milwaukee Railroad Company, entered in this Court" * * "and all "executions and proceedings thereon be, and hereby are, vacated, an-"nulled, made void, set aside, so that the same shall have no further "effect whatever." Record, p. 31.

It is impossible to prove an axiom; impossible to argue either for or against plain, unambiguous language. No illustration can make this decree plainer, no human language could make it more specific, complete or absolute. When a lease is absolutely "vacated, anulled and made void, so that the same shall not hereafter *be of any force or effect whatever:*" and the lessee is "*perpetually* enjoined and restrained" from claiming or doing anything under or by virtue of the lease; can anything more be done to complete its destruction? When a judgment is absolutely "vacated, annulled, made void, set aside, so that the same shall have *no further effect* WHATEVER," can it possibly be claimed that the judgment is perfectly good as between the parties to it, and remains a lien upon the debtor's property against all the world, except one, Cleveland? If this lease and judgment have any existence after the sweeping decree above quoted, then it is certain that it is not in the power of any Court to destroy either of them. What human language could make one, if this is not an absolute decree?

The Court in the Cleveland suit undoubtedly had the power to postpone the Chamberlain lease and judgment to other creditors, leaving it in full force as between Chamberlain and the Company. *But this it did not do.* Mr. Webster once triumphantly defied his opponent to reason the *seal from a bond*, yet it would seem that such a task were quite as easy as to establish that a judgment which has been vacated is

still a judgment; that a judgment which has been "vacated, set aside, made void, so that the same shall have *no further effect whatever*," is after all, a *pretty good judgment*, and PERFECTLY CONCLUSIVE against all the world, except Newcomb Cleveland. By nothing short of the utmost violence upon language can this decree be read otherwise than as it is written, a complete absolute annihilation of both lease and judgment, to all intents and purposes, and as to all persons and parties.

WHAT WERE THE RESPECTIVE RIGHTS *of Chamberlain and the Company, as to the operation and management of this railroad after the Cleveland decree?*

Here was a vast public enterprise, a railroad, with franchises and appurtuant property worth millions of dollars, which must be thereafter operated by some one, or the franchises would become forfeited to the State by *non user*.

There were but three parties before the court.

(1) Cleveland a judgment creditor,

(2) The Railroad Company.

(3) Selah Chamberlain, the lessee in possession.

Which of these parties did the Court intend to have operate the road, after the decree.

It is certain Chamberlain could not thereafter manage the road "under his lease for he was "*perpetually* enjoined and restrained "from using, managing, running, controlling or meddling with said "railroad, or the rolling stock, personal property, or any of its ap-"purtenances or franchises, or anything connected therewith, under or "by virtue of said" lease.

The decree did not authorize Cleveland to operate the road, or in any way interfere with it, by appointing a Receiver or otherwise.

Who was to operate it? Manifestly the Railroad Company and no one else. Suppose that the day after this decree, the Company had entered into possession and commenced running trains, as it had done before the lease to Chamberlain. Could Chamberlain, whose lease was absolutely vacated, and who was perpetually enjoined from meddling with the road or its franchises or rolling stock in any manner, and from pretending to set up any right under his lease, have prevented the Company's doing so? Certainly not. Could Cleveland have prevented it? Certainly not, for the decree gave him no right to operate

or control the operation of the road. The Company was originally charged with this duty, which it had sought by the lease to delegate to Chamberlain; but when the lease was swept away and Chamberlain *perpetually* enjoined from operating the road, did not the right and duty of the Company under its charter at once revive, even conceding the lease to have suspended it? The *restraining* clause in the decree is conclusive of the intention of the Court, and gives character to the decree *as an absolute adjudication between Chamberlain and the Company.* He was enjoined from managing or interfering with the road, not as against Cleveland, nor until the tolls of the road should satisfy Cleveland's judgment, but perpetually, *forever.* And no party or person was appointed to this duty. In the very nature of things, the Company must resume control of the road, after Chamberlain was enjoined from so doing. This must have been the intention of the Court, or the Court must be deemed to have intended that this great public enterprise should be abandoned, its franchises become forfeited, and creditors and everybody else connected with it, be ruined outright. It is absurd to say that this decree did not change the relations of Chamberlain and the Company, *inter se*, as to this great property. It bound Chamberlain hand and foot, not for a time, nor for a purpose, but *absolutely, perpetually, forever.* The decree manifestly proceeded upon the first ground taken in the bill, that the lease was an unauthorized act of the Company *ultra vires*, void as between the parties, and as between the parties and the public; and so the decree extirpated the lease, "wrung its neck," and trampled it under foot. It was no longer to be any protection to Chamberlain in his usurpation of great corporate franchises; no longer to protect the Company in its evasion of its duty to operate this road itself. And the moment the decree was enrolled, it became the right and the duty of the Company to resume its abdicated franchises, and exercise them for the public benefit, according to its charter obligations to the State, and neither Chamberlain, nor any one else, could interfere.

IT IS THE SPECIAL BOAST of a court of equity, that it does complete justice, and not by halves; that its decrees not only settle rights as between plaintiff and defendants, but as between the defendants themselves. The reason given for making all persons interested in the subject matter, parties defendant, is that the Court may by one decree

accomplish what would otherwise require many suits, and may at once adjust the rights of all parties interested. This, its decrees would not do, if they were not equally binding among defendants in subsequent litigation between themselves, as between the plaintiff and the defendants. The cases fully establish this quality of decrees in equity.

Story Eq. Pl. sec. 72, 73.
Farquarson vs. Seaton, 5, Russ. 45.
S. C. 5, Eng. Ch. 46.

2. Starting from the absolute character of this decree, we come to the question, whether it can be used in evidence by any person against Chamberlain to prove that he is not a lien creditor of the La Crosse Company. On such an issue being made up between us and Chamberlain, he produces his lease and the record of his judgment. We are no party to either lease or judgment. Yet no one doubts that both as by us, are competent evidence.

Why is it that the record of the judgment at law, in the suit between Chamberlain and the La Crosse Company, is evidence of his being a lien creditor of that Company, in a suit against us, who were not parties to that judgment? It is because a judgment is "the only proper evidence of itself, and is conclusive evidence of the fact of the rendition of the judgment, *and of all the legal consequences resulting from that fact*, whoever may be the parties to the suit in which it is offered in evidence.

1 Green'l Ev., sec. 538.

On the question in this suit, between us and Chamberlain, whether or not he is a creditor of the La Crosse Company, the judgment record, in a suit between Chamberlain and the Company is proper, and the only proper evidence, even as against us, who were not parties to that suit. So when we are called upon to prove the issue on our part, prove that he is not a lien creditor of that Company, we produce the record of another suit, to which both he and that Company were parties, and in which suit, this very judgment was set aside, vacated, annulled, so that it should thereafter have no effect whatever. Suppose, after the rendition of the judgment at law in favor of Chamberlain against the Company, the Company had prosecuted a writ of error to the Supreme Court of the United States; and upon that writ, the Supreme Court had reversed, vacated, and set aside the judgment.

Could not any person, against whom Chamberlain afterwards produced the record in the Court below as evidence of his being a lien creditor of the Company, have replied the record of the cause in the Supreme Court on the writ of error, *in which the same judgment had been vacated?* Such record of the Supreme Court would be evidence in favor of any person in the world, because that record would be evidence of itself, and conclusive evidence of the fact of the rendition of the judgment (in that Court reversing and vacating the judgment in the Court below), *and of all the legal consequences resulting from that fact*, without regard to who were parties in the suit in which it was offered.

1 Green'l Ev., sec. 538.

It is presumed every one would agree, that in such a case, between Chamberlain and third persons, the judgment of reversal on the writ of error, would be a conclusive answer to the record of the judgment itself; and yet it is confidently submitted, that no distinction can be shown between the record on such writ of error, and the record of any other cause to which both parties to the judgment were parties, over which the Court had jurisdiction, and in which, acting within its admitted jurisdiction, the Court had rendered the same judgment, viz.: reversed, annulled, vacated and set aside, his judgment against the Company. If we cannot avail ourselves of this decree vacating his judgment, *because we were not parties to that cause*, we could not avail ourselves of the judgment of the Supreme Court on writ of error, in the case supposed, *for the same reason.*

3. Should your Honors be against me as to the broad doctrine of my second point, there is another, a *gentler*, ground, sufficient for our purpose, upon which authorities might be accumulated without end.

JUDGMENTS AND DECREES ARE CONCLUSIVE BETWEEN THE PARTIES, AND EQUALLY SO BETWEEN THE PRIVIES OF THE PARTIES IN ANY SUBSEQUENT SUIT.

If it be not presumption in us to say that the Cleveland decree must be read as it reads; and applied as it is; that it cannot be corrected if erroneous, limited or changed in any way, when offered collaterally; then it is certain that in any subsequent suit between Chamberlain and the company, this decree would have conclusively established that he no longer had any lease or judgment, even as against the company. If so it follows that it is equally conclusive in this suit between Chamberlain

and the Minnesota Company, which is in privity with the La Crosse and Milwaukee Company. The mortgage to Barnes, under which the Minnesota Company claims as purchaser from the La Crosse Company, was executed pending the Cleveland suit. The title of the Minnesota Company, when obtained on the foreclosure, related back to the date of that mortgage. It is a universal rule, that the title acquired at a creditors sale, whether on judgment at law, or foreclosure of mortgage, relates back to the point of time when the creditor for whose benefit the sale is made, first fixed his debt as a specific lien upon the property. When the suit is commenced by attachment the title acquired at sale on execution, relates back to the date of the attachment.

Tyrrel's heirs vs. Roundtree, 1 McLean, 95.
Locky vs. Seibert, 23 Missouri, 85.
Abbott vs. Sturtevant, 30 Maine, 40.
Martin vs. Driden, 1 Gil. 213.
Tappan vs. Harrison, 2 Humph, 172.

Where the judgment is a lien, the title relates to the date of docketing the judgment.

Story J. Conrad vs. The At. Ins. Co., 1 Pet. 442.
Hutchinson vs. Horn, 1 Carter (Ind.) 363.
Kollock vs. Jackson, 5 Geo. 153.
Miller vs. Estill, 8 Yerg, 452.
Smith vs. Allen, 1 Blackford, 22.
Scott vs. Percal, 7 Blackford 68.

Where the delivery of the execution or a levy, is necessary to create lien, the title relates to the time when this was done.

Million vs. Riley, 1 Dany, 360.
Addison et al. vs. Crow, 5 Dana, 271.
McClure vs. Englehardt, 17 Ill., 47.
Bagley vs. Baily, 4 Shep. 151.

A mortgagee is deemed a purchaser as of the date and registration of the mortgage.

2 Powell on mortgages, 654, notes.
Frisbee vs. Thayer, 25 Wend. 399.
James vs. Johnson et al 6 J. Ch. 417.
Dehaven vs. Landell 31 Penn. St. 120.
1 Powell on mortgages, 211 N. S.
Chapman vs. Emery, Cowp. 278.

" A mortgagee is a purchaser within the statute 27 Eliz., C. 5 ; Lancaster v. Doland, 1 Rawe 244; Pres. Cor. v. Wallace, 3 Rawe 130 Lewis v. Love, 2 B. Monroe 345; Ledyard v. Butler, 9 Page 137; Clapp v. Leatherbee, 18 Pic. 138" 1 Am. Lead Cases 62.

Fresby vs. Thayer 22 Wend. 398, Nelson C. J. "A mortgage is " deemed a purchaser *sub mode*, he is so regarded every day under the " statute respecting fraudulent sales; and protected within the saving " clause in favor of subsequent purchasers in good faith,(See also Powell " on mort., 581, and Johns. Ch. R. 417.) The reason of the excep- " tion applies as strongly, *to the extent of the interest involved*, to the " mortgage as in case of an absolute purchase."

2. A sale or conveyance made to defraud creditors, is void as to a subsequent purchaser for valuble consideration *even with notice*, and of course the purchaser at the foreclosure sale succeeds to the right of the mortgagee to set aside a prior fraudulent conveyance.

1 Am. Lead Cases., 61.
Ricker vs. Ham, 14 Mass., 137.
Clapp vs. Leatherbee, 18 Pic., 131.
Clapp vs. Tyrell, 10 Pic., 247.
Lewis vs. Love's Heirs, 2 B. Mon., 347.
Mason et al. vs. Baker, 1 Marshall 210.
Verplank vs. Sterry, 12 John., 536.
Hudnall vs. Wilder, 4 M. McCord., 295.

A foreclosure by advertisement in Wisconsin, as the Barnes mortgage was foreclosed, vests in the purchaser at the sale, the fee of the property, and bars "all claim or equity of redemption of the mortgagor, " his heirs and representatives, and all persons claiming under him, by " virtue of any title subsequent to such mortgage."

R. S. Ch. 154, Sec. 18.
Murphy vs. Farwell, 9 Wis., 102.
Allen vs. Case, 13 Wis., 621.

In other words, the purchaser at the sale acquires a title by purchase from the mortgagor, *as of the date of the mortgage*. Therefore the Minnesota Company is a purchaser from the La Crosse Company *pendente lite*, as to the Cleveland suit; and would have been bound by a decree in that cause, declaring the lease and judgment *valid as between the parties*. And as the decree would have bound the Minnesota Company

had it been in favor of such validity of lease and judgment, it can be taken advantage of by this company having been against such validity. Estoppels must be mutual, and whoever would be bound by a decree if adverse, may take advantage of it, if it is favorable to his rights Purchasers of the subject matter of the litigation *pendente lite*, are effected by the decree to the same extent, as though they were parties to the record. Grantees and assignees of a party to the record, after judgment or decree, are equally bound with the party.

Carver v. Jackson, 4 Pet 85, 86.
Smith v. Kernocken, 7 How 198.
1 Green'l Ev., sec 523, notes and cases cited.
Doe vs. Harvey, 8 Bing 242.
Doe vs Whitcomb, 8 Bing. 46.
Jackson vs. Stone, 13 J. 447.
Morgan vs. Varich, 8 Wend. 587.
Nelson C.J. Leeland vs. Tousey, 6 Hill 335.
Burough vs. Wichole, 3 Brown Par. Cases, 595.
Benson vs. Olive, 1 Barn., K. B., 348.

THEREFORE THE MINNESOTA COMPANY, which is both in privity of estate with the old company, and a purchaser from it *pendente lite*, can avail itself of the Cleveland decree as against Chamberlain, in the same manner and to the same extent as the La Crosse Company could have done It may therefore rely upon the Cleveland decree to show Chamberlain not a lien creditor, by virtue of his lease and judgment, which were thereby vacated, as I have already shown the old company could have done.

This is in effect decided by this court in the case Chamberlain v. Cleveland, 1 Black., 426. The court permitted the Minnesota Company to intervene for the purpose of dismissing the appeal upon the express ground that Chamberlain by managing both sides of the appeal was endeavoring to reverse the decree below, and thus prejudice "the interest of persons not parties" to said appeal The reversal of that decree would not have affected the interest of the Minnesota Company, if the decree could not have been pleaded by the company.

2. We are under no obligation here to show that the Cleveland decree was properly, that is, correctly, rendered. It remains in full force, and

when it is offered in evidence, it cannot be attacked collaterally for even manifest palpable error.

Voorhies vs. Bank of U S , 10 Pet. 449
Huff vs. Hutchinson, 14 How. 588

There is no question as to the Courts having had *jurisdiction* to render that decree. *And it is only upon the ground of jurisdiction* that any judgment *can be assailed collaterally.* We might safely concede that this Cleveland decree was erroneous; either because not sustained by the evidence, or as going beyond the prayer of the bill; so that the Supreme Court would have reversed it on appeal. This Chamberlain attempted; and having no hope of success when opposed, he bought up and controlled both sides of the cause for the purpose of making success in the Supreme Court certain; but this "*innocent stratagem*" was detected, and his appeal was dismissed *cs a fraud upon the Court.*

Cleveland vs. Chamberlain 1, Black. 419.

But it is by no means conceded that that decree was erronous or could have been reversed on appeal. I have no idea that it could have been, if properly presented to the court by counsel opposed to Chamberlain. That must also have been the opinion of Chamberlain himself when he resorted to the fraudulent scheme of reversing it, by managing both sides of the appeal. The Cleveland bill rested upon two grounds: (1) that the lease was *ultra vires* and therefore void as between the parties to it, and (2) that it was given with the intent in fact, to defraud creditors. Upon the first ground, which we shall show hereafter was well taken, the lease was properly vacated *inter se se.* At all events, upon a cross bill filed by the Company, such decree would have been proper. And that the full decree was rendered without cross bill, even if conceded to be erroneous, does not render the decree void.

Gould vs. Stanton 16, Conn. 12, 20.

Counsel opposed cite a class of cases, holding that where, at the suit of a creditor, deeds, judgments, &c , are decreed "to be void as to creditors," that in a subsequent suit by a creditor not party to the first, the decree is not conclusive against the defendant ; because had it been the otherway, it would not have concluded the plaintiff This I concede to be the law; but such is not this case. Here the lease was not postponed as to creditors; it was annulled, so that it should not

thereafter have any effect whatever; and so of the judgment, it was not postponed, but *vacated*.

II.

But passing the effect of the Cleveland decree, if the validity of the lease and judgment are now to be considered as open questions, both must be declared null and void, for reasons which are still to be given.

There was when this lease was executed no law of Wisconsin authorizing a corporation to lease its road and franchises, and for want of such authority the lease is void.

Beman vs. Rufford, 6 E. L. & Eq. Rep. 110.
Winch vs. Birkenhead, &c., 13 E. L. & Eq. Rep. 516.
The Great Nor. vs. The East Ang., &c., 41 Eng. Ch. Rep. 306.
S. C., 7 Hare Rep. 306.
The New York & M., &c., vs. Winans, 17 How. 30.
Johnson v. S. & B. R'y Co., 3 De Gex M. & G. 914.
London, &c., R'y Co., vs L. & S.W. R'y Co., 4 De Gex & J. 362.

So strictly is this doctrine held that an incorporated company cannot form a partnership by which others are to be admitted to a joint control or participation in the profits of its undertaking.

Sharon Canal Co. vs. Fulton Bank, 7 Wend. 412.
S. & B. R'y Co. vs. London, &c., 4 De Gex M & G. 115.

The attempt to draw a distinction between the right of the company to lease its franchise to exist, which it is conceded cannot be done, and its right to transfer its franchise to operate the road, which it is claimed can be done, is borrowed from a remark of Curtis, J., in

Hall vs. Sullivan R. R., cited, Redfield Railways, p. 578.

But that case did not so decide; and the case

Peter vs. Kendall, 6 B. & Cres., 703,

cited by Judge Curtis to sustain this distinction, *did not involve this point*. In that case Peter had leased a ferry to Brown, but afterwards Brown had surrendered to Peter, and become his servant. It was objected that the action should have been in the name of Brown, the lessee, but the Court held that he, having surrendered, and become the tenant of Peter, the action was well brought; and the Court were not called upon to decide, nor did they, upon the validity of the lease to Brown. But Judge Curtis said in this opinion, that if compelled to

decide the question, he should follow *Pierce vs. Emery*, 32 *N. H.*, 484 where it was held *that without legislative license, no transfer of the right to operate the road could be made.* It is impossible for a corporation to make a contract or conveyance by which it puts it out of its power to perform its duties to the public.

Clark vs. Washington, 12 Wheat., 40.
The N. Y. &c. vs. Winans, 17 How. 30.

As to the duty of the courts to confine corporations to such powers as are expressly granted them, and not by implication enlarge those powers in favor of monopolies and against the public; see

C. J. Taney, Warren Bridge case, 11 Pet. 544.
Perine vs. Ches. & Del. C. Co., 9 How., 183.

2. To avoid this objection, it is claimed that this instrument is not a lease, as it purports to be, but is in legal effect a mortgage, and that by its charter and the laws of the State, the Company had authority to make a mortgage. To this it may be said (1) that the authority to make a mortgage could only be exercised according to the manifest intention of the Legislature, by giving a mortgage in the usual form to be foreclosed on default by the Company. If the mortgage is so given *as to perform the office of a lease*, and give possession before condition broken, and for an indefinite term, then it is as illegal as a lease proper would be. What cannot be done directly, the law does not permit to be done indirectly.

This lease, whether *called* a *lease* or a mortgage, is obnoxious to all the objections taken in the cases above cited. It was a surrender and assignment of the rights and franchises which were delegated by the Legislature to the corporation, and might continue indefinitely, without any default on the Company's part. The policy of the State as to railroads when this lease was executed was perfectly clear. They might be mortgaged, but upon such mortgage after default there must be foreclosure by *public sale*. By R. S. 1849, in force when this lease was given, it was provided as to all mortgages, that in all cases for the foreclosure of mortgage the Court, if the money was not brought into Court, should make decree for the sale of the premises, either in parcels, or entire in certain cases. Chap. 84, Sec. 88, 90. The proceeding of strict foreclosure was thereby in effect abolished. A mortgage on a railroad must therefore be followed by a public sale, at which all the citizens could compete by bids for the property; and the Company could not, even by

giving mortgage, secure the succession to the mortgagee. But this lease, or *this mortgage*, if that word is preferred, completely defeated this policy of the law. This railroad might remain a thousand years in the possession of Chamberlain and his heirs without any default on the company's part, and without any opportunity given to the public to purchase the road and franchises. No matter what called, this instrument performed the office of an indefinite lease of the road; and for that reason was *ultra vires* and void. It was an act beyond the power of the company to perform, and therefore void *ab initio* BETWEEN THE PARTIES TO IT. The company could at any time have set aside, or disregarded it; and Chamberlain would have been without remedy.

See cases cited above from English Chancery reports.
Angel & Ames, Corp., Sec. 111, 256, 258, 273, 391, 392, 393.
Bank of Augusta vs. Earle, 13 Pet., 587.
People vs. Utica Ins. Co., 15 J., 387.
Bank U. S. vs. Danbridge, 12 Wheat., 68.
Dartmouth College vs. Woodward, 4 Wheat., 368.
Madison, &c., vs Watertown Plank Road, &c., 7 Wis., 59.

This instrument is not a mortgage, or at least is not such a mortgage, nor given for such a purpose, nor in such form as contemplated by the Legislature. Chapter 78, Private Laws 1856, authorized the Company to make and issue its bonds to be secured by a mortgage; but required the company by resolution to prescribe "*the sum or sums* for which "each of such bonds shall be issued, *the time or times*, and *place or* "*places*, when and where the principal and interest of the same shall "be payable; the person or persons, trustee or corporations to which "they shall be payable, and whether payable to order, or to bearer, or "how otherwise negotiable; the rate of interest which such bonds shall "bear, and the manner and form in which they and the interest coupons "annexed to them shall be executed. And to secure the payment of "any or all of said bonds, the La Crosse and Milwaukee Railroad "Company are hereby authorized and empowered in its corporate "capacity to make, execute and deliver a mortgage or deed of trust "upon the whole, or any part of its railroad, constructed or authorized "to be constructed, or of any or all of their estate, real, personal or "mixed, in possession or expectancy; and the said company is also "hereby authorized and empowered, in and by such mortgage, or deed

" of trust, to confer upon the trustee or mortgagee, full and ample " powers, to enter in and upon, and to take possession of, have, use " and employ, or to sell and dispose of the whole, or any part of said " railroad or estate, together with the functions appertaining to said " railroad, and all corporate and other franchises, rights and privileges " of the said La Crosse and Milwaukee Railroad Company."

This is believed to be the first act, authorizing the company to mortgage its franchises. And it is manifest what kind of a mortgage was contemplated by this act, viz: a mortgage to secure a fixed sum, payable at a fixed time. Such a mortgage the company was empowered to make. But this lease has no resemblance to it; it is not for a fixed, or certain sum; it is not payable at any particular time or place. It was putting the company, the stockholders and the public into Chamberlain's power completely. No one could know, without a litigation, the extent of his claim, or the amount to be paid for redemption. It was a complete departure from the policy of the law *and* A LEASE, not a mortgage, of the property and franchises of the company. The language of the instrument is conclusive; it is not a *grant* of the fee upon condition, but is expressed as follows: the company "hereby *sells and convey*s to the said " 'Chamberlain' all its personal property" &c., and the company "hereby " LEASES and LETS to the said 'Chamberlain' from and after the thirtieth " day of September, in the year 1857, *for an indefinite term of time*, to " be determined in the manner hereinafter specified, its entire railroad," &c. Mr. Emmons, in some of his argument, has claimed this lease to be a *Welsh Mortgage*.

A Welsh Mortgage, was a conveyance of the fee, upon the understanding that the rents and profits were to be received instead of the interest, until the mortgager should pay the whole principal sum; this instrument is not a conveyance of the fee, but a *lease* for a *term*; and the rents and profits are to be applied to four different subjects, before any application could be made by Chamberlain to his own claims, and then that application was to be made not to pay the interest on a certain and indefinite sum of principal, but to the payment of what was due or to become due Chamberlain from the company.

THIS INSTRUMENT IS A LEASE, and not a mortgage, and was executed without any authority from the Legislature; and was therefore *ultra vires* and void, even between the company and Chamberlain; and upon this

ground alone, the absolute decree in the Cleveland suit, was correct; and could not have been reversed on appeal. This is one of the grounds, as we have before shown, taken in the Cleveland bill; and must be presumed from the record of that cause, to have been the ground upon which the decree rested. The Legislature never intended to authorize an instrument like this lease to be followed by immediate possession. Judge Ruffin, in Pointdexter v. McCannon, 1 Bad. & Dev. N. C. Eq. says: "No mortgagee or mortgagor ever yet made a contract, upon which the "possession was to change immediately, unless it was the veriest grind- "ing bargain that could be driven with a distressed man, who had no "way to turn."

III.

This instrument, whether lease or mortgage, was and is void as to all existing or subsequent creditors, in that by its very terms it hindered, delayed and defrauded creditors, by cloaking the property of the company and applying the rents and profits to the exclusive benefit of the company, making no provision for creditors.

The lease, and the contract between the company and Chamberlain of the same date, (Record p. 29)are to be construed together as parts of one entire transaction.

In other words, a debtor corporation, in failing circumstances, for the purpose of continuing its business for its own benefit, makes an arrangement with Chamberlain, to go on in his own name but for its benefit, and apply all the revenues of its property to its benefit, in defiance of creditors.

This is precisely the case, which the statutes against fraudulent conveyances were intended to reach.

Chap. 6, 50 Ed., 3 passed in 1376, (2 Eng. St. at large, p. 202,) the first statute upon this subject, has a preamble reciting the evil to be remedied as follows:

"Item, because that divers people inherit of divers tenements, bor "rowing divers goo ls, in money or in merchandize, of divers people o "this realm *do give their tenements and chattels to their friends*, b "collusion thereof, *to have the profits at their will*, and afterwards do

"flee to the franchise of Westminster of St. Martin le Grand, of Lon-
"don, or other such privileged places, *and there do live a great time*
"*with an high countenance of another man's goods and profits of the*
"*said tenements and chattels*, till the said creditors shall be bound to
"take a small parcel of their debt, and release the remnant."

"It is ordained and assented, that if it be found that such gifts be
"so made by collusion that the said creditors shall have execution of
"the said tenements and chattels as if no such gift had been made.

The 13 Eliz., chap. 4, (6 Eng. St. at large 356,) recites: "For as
"much as not only the Queen's most excellent Majesty, but also divers
"of her Highness' good and loving subjects, * * may have
"incur and receive great loss and prejudice by reason of fraudulent
"and covinous conveyances * * heretofore made or hereafter
"to be made, &c., * * "which were or hereafter shall be meant by
"the parties making the same to be fraudulent," &c., * * *
"*or else by the secret intent of the parties, the same to be their own*
"*proper use*, and at their free disposition, colored nevertheless with
"feigned countenance, and show of words and sentences, as though
"the same were made *bona fide* for good causes and upon just and
"lawful considerations; for remedy of which inconveniences, &c., be
"it ordained," &c., &c.

The attempt of fraudulent debtors from the earliest time to the execution of this lease has been to save their property from their creditors, and apply it, or the rents of it, more or less directly to their own benefit. A debtor in a flourishing business, with property ample to pay his debts, falls into sudden, and he hopes, temporary embarrassment, and is unable to meet his pressing debts. He flatters himself, that another year it will be better with him, or times will be easier, and money more plenty; and if he can save his property till then, he can pay all, and save something for himself and family. All this is very well, if the creditor will consent, but the debtor has no right to demand it. He may appeal to the creditor's mercy, but cannot demand delay as a matter of *right*.

The law and morality of this subject are all summed up, by the great Teacher, in Matthew XVIII, v. 24—27.

"And when he had begun to reckon, one was brought unto him which
"owed him ten thousand talents. But for as much as he had not to

"pay, his lord commanded him to be sold, and his wife and his "children, and all that he had, and payment to be made. The servant "therefore fell down and worshipped him, saying, lord *have patience* "*with me*, and I will pay thee all. Then the lord of that servant *was* "*moved with compassion, and loosed him and forgave him the debt.*"

In this matter Chamberlain and the company are *in like condemnation.* All men must be deemed to have intended the consequences of their conduct. Here the thing done was a fraud upon creditors. As both Chamberlain and the company intended to do what was done; they must both be deemed to have intended thereby to defraud creditors. By the contract Chamberlain agreed to complete the road for the company; by the lease the company agreed that the rents and profits, toll and income of its railroad and franchises (all the property it had) should, after paying interest on the mortgages, be applied to what was then due Chamberlain, *and what should thereafter accrue to him under his contract of that date for the completion of the road.* This was intended by both parties; this was agreed upon; *this was a fraud upon creditors:* Chamberlain had a perfect right at that time, if the company was then indebted to him, and unable longer to continue the construction of the road, to take any proper steps to secure his then existing indebtedness; but he had no right to couple the security of his debt with a contract to aid the company, to cloak its property and apply its earnings to the completion of the road; and his attempt to do so marks the whole transaction as a fraud upon creditors, and therefore he cannot, as against creditors, insist upon his lease and judgment even to secure his then existing indebtedness.

Though a purchaser may pay full value for property, yet if he knows it is sold to defraud creditors, the sale is void.

Gardner vs. Otis, 13 Wis., 460.
Beales vs. Guernsey, 8 J., 446.

A sale on execution, issued on a valid, unpaid judgment, if intended to defraud creditors is void. *Crary vs. Sprague*, 12 *Wend.*, 41. A debtor at the point of death makes conveyance, to be applied *part to the payment of bona fide debts*, part for the benefit of wife and children; *the sale is void altogether.* Welcome vs. Batchelor, 10 Shep., 85.

A conveyance which creates a trust, whether secret or avowed, in favor of the grantor, renders the transaction void, even though there

may be mingled with it provisions in favor of *bona fide* creditors.
Shaffer vs. Watkins, 7 Watts and Serg., 219.

"Twyne's case, 2 Resolution. "Secondly it was resolved, that "notwithstanding here was a true debt due to Twyne, and a good consideration of the gift, yet it was not within the proviso of the said act "of 13 Eliz., by which it was provided that the said act shall not extend to any estate or interest in the lands, &c., goods chattels, made "on a good consideration and *bona fide*, for although it is on a true and "good consideration yet it is not *bona fide*, for no gift shall be deemed to "be *bona fide*, within the said provision which is accompanied with any "trust," &c. 1 Smith Leading Cases, p. 1, and notes.

In *Pickstock vs. Lyster*, 3 *Maul and Sel.*, 317, an assignment was upheld, the court saying: "*This was not a deed by which the party stipulated for any benefit to himself*, but all the property of the party is to be distributed among his creditors including this creditor." In Holbird vs. Anderson, 5 T. R., 235, the court, Lord Kenyon says: "There was no fraud in this case, the plaintiff was preferred by his debtor Charter, *not with a view of any benefit of the latter* but merely to secure a just debt."

Conveyances to secure future benefit support or maintenance are void.
Crane vs. Stickles, 15 Vert., 252.
Jones vs. Spear, 21 Vert., 426.

The slightest trust reserved in favor of the grantor is fraud upon creditors.
Colburn vs. Pickering, 3 N.H., 415.
Russell vs. Hammond, 1 Atkins, 16.
Mackie vs. Cairnes, 5 Cow. 556.
Barnes vs. Griffin, 2 Cow. 365.

This lease contained a provision as follows: "It is further mutually "agreed that the said 'Chamberlain' may, if it shall be found for the "interests of said company, *buy additional rolling stock*, and appropriate "the receipts of said railroad to the payment of the same." This provision alone would render the lease fraudulent as to creditors. Millions of dollars might have been expended, *if the interests of the company*, not its creditors required it.

In Owen et al. vs. Body. et al., 5 *A. & Ellis*, 28, a tavern-keeper made an assignment to trustee for the benefit of creditors, by which the assignee *was to continue the business of the debtor*, and apply the proceeds, to carry on the business, keep up the stock in trade, purchas

horses and carriages, and pay the surplus of profits to creditors; and to this end assigned all his tavern stand and property. The assignment was held void. In Barnum vs. Hemstead, 7 Paige 568, it was held that an assignment, containing provision for future advances to the assignor, or for future liability which the assignee might assume for him, could not be sustained. The Chancellor said, "If I was satisfied that such " was a fair construction of the instrument, I should not hesitate for a " moment to declare it fraudulent and void upon that ground alone; as " such an attempt to secure a future credit and benefit to the assignors, " by means of the assigned property, to the prejudice of their present " creditors, could not be sustained in any court."

But the most pertinent authority is Bodly vs. Goodrich, 7 How., 276, approving the decision in Arthur v. The Bank, &c., 9 Smedes & M., 394, where a conveyance from a banking and railroad company was made to assignees, for the reason, as the assignment itself recited, "that an " assignment of the property debts and effects of the said corporation " should at once be made for the benefit of its creditors, as will most " effectually promote the interest of the creditors of the institution, and " protect its debtors from loss and sacrifice; and at the same time fur- " nish means to finish and complete the railroad immediately, and to " protect and secure to the stockholders of the road the franchises gran- " ted by the charter." Exactly the motives Mr. Kilbourn says actuated him in making the lease, and exactly the thing he attempted to accomplish.

The court say: "Upon its face this deed shows an intention by the " bank to postpone its creditors, use the effects of the bank, for the com- " pletion of the railroad, pay the trustees enormous salaries, and make " no dividend among the creditors of the bank, until these objects were " accomplished. This was proposed to be done with the consent of " creditors, and if that consent had been given, there could be no objection " to the arrangement. The motive avowed to complete the railroad, the " greater part of which had been made, and by which an income would " be secured for the benefit of the creditors and the stockholders of the " bank, would have been legal and perhaps wise, had the creditors con- " sented. But the plaintiff in the judgment under which the property " claimed by the plaintiffs was sold, did not consent; consequently he " was not bound by the deed of assignment. It was fraudulent as against

" him and all other creditors of the bank who did not become parties to " the deed."

It would be impossible ever to find two cases more nearly parallel than the one just quoted, and the one we are arguing. The motives the same, the means the same, the result the same. It is wholly immaterial by what instrumentality a corporation proposes to retain control of its property, and apply its earnings to the completion of its road, in defiance of creditors. It is the thing itself, and not the means of its accomplishment that the law forbids. If creditors could be compelled by this corporation to stand by while it applied its earnings to the completion of its road; it would be very little satisfaction to them to know that this fraudulent result was accomplished, not by a lease, but by a " Welsh Mortgage." It is the thing itself, and not the manner of its consummation that is a fraud upon them; and any cover or device under which it is sought to be veiled will be swept away, and the rights of the creditors vindicated.

THIRD.—Where the whole transaction as it is embodied in writing between the parties shows the fraudulent intent; that is, where the thing contracted for is itself a fraud upon creditors; the question of fraud, though one of facts, is for the exclusive determination of the Court, and not for a jury, even in action at law; and both parties to the contract are charged with notice of, and are conclusively presumed to have participated in, the fraudulent intent.

Hutchinson vs. Lord, 1 Wis., 286.
Keep vs. Sanderson, 2 Wis., 42.

FOURTH.—CAN THE MILWAUKEE AND MINNESOTA COMPANY, THE PURCHASER AT THE BARNES FORECLOSURE SALE, TAKE ADVANTAGE OF THE FRAUDULENT CHARACTER OF THIS LEASE?

After the giving of the lease, and while Chamberlain was in possession under it, and pending the Cleveland suit, the company mortgaged all its railroad, property real, personal and mixed, actions and causes of action, rights and franchises, to Barnes, to secure bonds of the company to the amount of $2,000,000: subject to all the mortgages on the road, specifying them, but not *subject* to the Chamberlain lease. This mortgage was foreclosed, and the purchaser is the Milwaukee and Minnesota Railroad Company. The bonds of the company secured by this mortgage were made and issued in 1858, *but the greater part of*

them were used by the company in payment of indebtedness existing before the lease was executed.

To the extent, at least, that these mortgage bonds were passed to creditors of the company in payment of indebtedness existing at the date of the Chamberlain lease, the Minnesota Company can assert the right of vacating this lease, as purchaser from an existing creditor. But I do not intend to pursue this subject further, as it is well settled by the authorities that subsequent as well as existing creditors and subsequent purchasers may set aside any conveyance which on its face shows it was made to hinder, delay or defraud creditors.

Barnes, the trustee in the mortgage, is to be regarded as a purchaser, if not a creditor, from the date of his mortgage. After its purchase at the foreclosure sale under that mortgage, the purchaser—the Minnesota Company—became entitled to assert, as against all the world, its right in two capacities: (1) as a purchaser from the mortgagor, as of the date of the mortgage, and to set aside any conveyance of the property obtained from the mortgagor by fraud and deceit—Dusen vs Fink, 15 Pic., 449, opinion by Chief Justice Shaw and numerous cases cited by counsel; (2) its right as an assignee of the creditor, *and all the right a creditor has to set aside a conveyance made in fraud of creditors.*

Dusen v. Fink, 15 Pick., 449
Troup v. Wood, 4 John, Ch. 228
Buffington v. Gerrish, 15 Mass., 156 and notes.

In Wadsworth v. Havens, 3 Wend., 413, the court, speaking of the defendant, who had purchased property at his own execution sale, says: "The defendant here was not only a subsequent creditor, but a *pur-* "*chaser* for valuable consideration; and therefore, according to the "third resolution in Twyne's case (3 Co, 83), had a right to avoid a "*precedent* fraudulent conveyance."

Chatauque Co. Bank v. Risley, 19 N. Y., 370.
Frakes v. Brown, 2 Blkfd, 295.
Pennington v. Clifton, 11 Ind., 162.

The legal principle that a fraudulent conveyance is void as to creditors, and that they therefore may sell the estate as though the conveyance had not been made, carries with it, as an inevitable result, that the purchaser at such sale may set aside the conveyance, which was void as to the creditor making the sale. This is the well estab-

lished law upon this subject, and I know of no case which even ruffles the current of the authorities; therefore Barnes by his foreclosure sale, vested in his purchaser—the Minnesota Company—all the right which he had to object to the Chamberlain lease as a fraud upon creditors.

Where the intent to defraud is clearly established in the making of the conveyance, the authorities are unanimous in holding that subsequent creditors may set it aside. Ex sting creditors are not *compelled* to do so, and may resort to and exhaust all the other property of the debtor; so that subsequent creditors would have a right to complain, if they could not in turn resort to the property fraudulently conveyed.

1 Story Eq., Sec. 361, "Where the conveyance is intentionally made "to defraud creditors, it seems perfectly reasonable that it should be "held void, as to all *subsequent* as well as all *prior* creditors, on "account of ill faith."

The doctrine of this court is, that a *mere* voluntary *bona fide* conveyance, by one not indebted at the time, is good against subsequent creditors; *but a conveyance made with a fraudulent intent as against existing creditors may be impeached by subsequent creditors.*

Sexton vs. Wheaton, 8 Wheat., 250.
Hinde vs. Longworth, 11 Wheat., 211.
Reade vs. Livingston, 3 John., Ch. 481.

See also sustaining the principle that a conveyance made *with an actual fraudulent intent* may be set aside by a *subsequent* creditor:

Smith vs. Lovell, 6 N. H. 67.
Paul vs. Crocker, 8 N H., 288.
Wadsworth vs. Havens, 3 Wend., 411.
Clark vs. French, 10 Shep., 221.
Damon vs. Bryant, 2 Pic., 411.
Tremble vs. Turner, 13 Smedes & M., 348.
1 Story Eq. Jur., Sec. 361 and notes.
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In 1 Am. Lead. cases, p. 56, the law upon this subject is stated as follows: "An intent actually to defraud creditors is to be legally "inferred from the grantors being insolvent at the time, *or greatly*

" *embarrassed*, or so largely indebted that his conveyance necessarily " has the effect to hinder and defraud creditors, and a voluntary con- " veyance made under such cases may be set aside by a *subsequent* " creditor:" and the following among other cases are cited:

Gilmore vs. N. A. Land Co., 1 Pet., C. C., 464.
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In McConnihe vs. Sawyer, 12 N. H , 403, the Court says: " That " *subsequent* creditors may take advantage of the fraud, and avoid the " conveyance, is a principle stated in Smith vs. Lovett, 6 N. H., 67, " and in Paul vs. Crocker, 8 N. H. 290; *and is so generally the* " *received doctrine, both in England and the United States, as to be* " *no longer an open question.*

See also Harrison vs. Cramer, 3 Clark, (Iowa) 543.

" A mortgagee is a purchaser within the statute 27 Eliz., C. 5 ; Lancaster v. Doland, 1 Rawe 244; Pres. Cor. v. Wallace, 3 Rawe 130 Lewis v. Love, 2 B. Monroe 345; Ledyard v. Butler, 9 Page 137; Clapp v. Leatherbee, 18 Pic. 138" 1 Am. Lead Cases 62.

Fresby vs. Thayer 22 Wend. 398, Nelson C. J. "A mortgage is " deemed a purchaser *sub mode*, he is so regarded every day under the " statute respecting fraudulent sales; and protected within the saving " clause in favor of subsequent purchasers in good faith,(See also Powell " on mort., 581, and Johns. Ch. R. 417.) The reason of the excep- " tion applies as strongly, *to the extent of the interest involved*, to the " mortgage as in case of an absolute purchase."

2. A sale or conveyance made to defraud creditors, is void as to a subsequent purchaser for valuable consideration *even with notice*, and of course the purchaser at the foreclosure sale succeeds to the right of the mortgagee to set aside a prior fraudulent conveyance.

1 Am. Lead Cases., 61.
Ricker vs. Ham, 14 Mass., 137.

Clapp vs. Leatherbee, 18 Pic., 131.
Clapp vs. Tyrell, 10 Pic., 247.
Lewis vs. Love's Heirs, 2 B. Mon., 347.
Mason et al. vs. Baker, 1 Marshall 210.
Verplank vs. Sterry, 12 John., 536.
Hudnall vs. Wilder, 4 M. McCord., 295.

It is therefore immaterial, whether Barns is regarded as a creditor, or purchaser, from the date of his mortgage, because in either capacity he was entitled to set aside the Chamberlain lease and judgment, they having been given and confessed, as the demurrer admits, with the intent to defraud creditors; and because, apart from the intention with which they were given, they did, in fact, unreasonably hinder and delay creditors.

And the purchaser at the foreclosure sale—the Milwaukee and Minnesota Company—has the same right to object to lease and judgment that the mortgagee, Barnes, had prior to the sale.

IV.

The lease was given and the judgment confessed by the company, in fraudulent collusion with Chamberlain, to hinder, delay and defraud the creditors of the company.

The allegations of the bill are clear and specific on this subject, and are admitted to be true by the demurrer.

V.

Where the whole transaction between the parties as it is embodied in writing shows the fraudulent intent; that is, where the thing contracted for is itself a *fraud* upon creditors; the question of fraud, though one of fact, is for the *exclusive* determination of the court, and not for a jury, even in an action at law; and both parties to the contract are charged with notice of, and are conclusively presumed to have participated in, the fraudulent intent

Hutchinson vs. Lord, 1 Wis., 286.
Keep vs. Sanderson, 2 Wis., 42.
Dunham v. Waterman, 17 N.Y., 9.

VI.

CAN THE MINNESOTA COMPANY TAKE ADVANTAGE OF THE FRAUDULENT CHARACTER OF THE CHAMBERLAIN LEASE AND JUDGMENT, APART FROM THE EFFECT OF THE CLEVELAND DECREE?

After the giving of the lease, and while Chamberlain was in possession under it, and pending the Cleveland suit, the company mortgaged all its railroad, property real, personal and mixed, actions and causes of action, rights and franchises, to Barnes, to secure bonds of the company to the amount of $2,000,000: subject to all the mortgages on the road, specifying them, but not subject to the Chamberlain lease. This mortgage was foreclosed, and the purchaser is the Milwaukee and Minnesota Railroad Company. The bonds of the company secured by this mortgage were made and issued in 1858, but the greater part of them were used by the company in payment of indebtedness existing before the lease was executed.

To the extent, at least, that these mortgaged bonds were passed to creditors of the company in payment of indebtedness existing at the date of the Chamberlain lease, the Minnesota Company can assert the right of vacating this lease, as a purchaser from an existing creditor. But I do not intend to pursue this subject further, as it is well settled by the authorities that subsequent as well as existing creditors and subsequent purchasers may set aside any conveyance, which on its face shows it was made to hinder, delay or defraud creditors.

Barnes, the trustee in the mortgage, is to be regarded as a creditor or purchaser from the date of his mortgage After its purchase at the foreclosure sale under that mortgage, the purchaser—the Minnesota Company—became entitled to assert as against all the world, its right in two capacities:

(1.) As a purchaser from the mortgagor, as of the date of the mortgage, and to set aside any conveyance of the property obtained from the mortgagor by fraud and deceit—Dasen vs. Fink, 15 Pick, 449, opinion by Chief Justice Shaw, and numerous cases cited by counsel :

(2.) Its right as a ssignee of the creditor, and all the righta creditor has to set aside conveyance made in fraud of creditors.

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" The defendant here was not only a subsequent creditor, but a *pur-*
" *chaser* for valuable consideration; and therefore, according to the
" third resolution in Twyne's case (3 Co , 83), had a right to avoid a
" precedent fraudulent conveyance."

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The legal principle that a fraudulent conveyance is void as to creditors, and that they therefore may sell the estate as though the conveyance had not been made, carries with it, as an inevitable result, that the purchaser at such sale may set aside the conveyance, which was void as to the creditor making the sale This is the well established law upon this subject, and I know of no case which even ruffles the current of the authorities; therefore Barnes as a creditor, by his foreclosure sale, vested in his purchaser—the Minnesota Company—all the right which he had to object to the Chamberlain lease as a fraud upon creditors.

Where the intent to defraud is clearly established in the making of the conveyance, the authorities are unanimous in holding that subsequent creditors may set it aside. Existing creditors are not *compelled* to do so, and may resort to and exhaust all the other property of the debtor; so that subsequent creditors would have a right to complain, if they could not in turn resort to the property fraudulently conveyed.

1 Story Eq., Jur., Sec. 361: " Where the conveyance is intentionally
" made to defraud creditors, it seems perfectly reasonable that it should
" be held void, as to all subsequent, as well as all prior creditors, on ac-
" count of ill faith."

The doctrine of this court is, that a *mere* voluntary *bona fide* conveyance, by one not indebted at the time, is good against subsequent creditors; but a conveyance made with a fraudulent intent as against existing creditors may be impeached by subsequent creditors.

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See also Harrison vs. Cramer, 3 Clark, (Iowa) 543.

"A mortgagee is a purchaser within the statute, 27 Eliz., C. 5; Lan- "caster vs. Dolan, 1 Rawe, 244; Pres. Cor v. Wallace, 3 Rawe, 130; "Lewis v. Love. 2 B. Monroe, 345; Ledyard v. Butler, 9 Page, 137; "Clapp v. Leatherbee, 18 Pic., 138." 1 Am. Lead. cases, 62.

Fresby vs. Thayer, 22 Wend., 398, Nelson C. J. "A mortgagee is "deemed a purchaser *sub mode* ; he is so regarded every day under the

" statute respecting fraudulent sales, and protected within the saving " clase in favor of sucsequent purchasers in good faith. (See also " Powell on mort., 571, and Johns. Ch. R. 417.) The reason of the " exception applies as strongly, *to the extent of the interest involved*, to " the mortgage as in case of an absolute purchase."

2. A sale or conveyance made to defraud creditors is void as to a subsequent purchaser for valuable consideration *even with notice*, and of course the purchaser at the foreclosure sale succeeds to the right of the mortgagee to set aside a prior fraudulent conveyance.

1 Am. Lead. Cases, 61.
Ricker vs. Ham, 14 Mass., 137.
Clapp vs. Leatherbee, 18 Pick., 131.
Clapp vs. Tyrrill, 10 Pick., 247.
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Mason et al. vs. Baker, 1 Marshall, 210.
Verplank vs. Sterry, 12 John., 536.
Hudnall vs. Wilder, 4 M. McCord, 295.

VII.

The bill in this cause was framed upon the theory that the Cleveland judgment was a legal lien upon the railroad, if not upon the rolling stock and franchises of the company.

But subsequent examination has satisfied me that in our State, judgments against a railroad company are not legal liens upon the railroad, rolling stock, or franchises of the company.

A. *What is the nature of a judgment lien?*

In *Conrad vs. The Atlantic Ins. Co.*, 1 *Pet.* 443, the court by Story J., say:

" Now, it is not understood that a general lien by judgment on land " constitutes, *per se*, a property, or right, in the land itself. *It only* " *confers* A RIGHT TO LEVY ON THE SAME, to the exclusion of other " adverse interest, subsequent to the judgment; and when the levy is " actually made on the same, the title of the creditor for this purpose

" relates back to the time of his judgment, so as to cut out intermediate " incumbrances. But, subject to this, the debtor has full power to sell, " or otherwise dispose of the land. His title to it is not divested or " transferred by the judgment to the judgment creditor. It may be " levied upon by any other creditor, who is entitled to hold it against " every other person, except such judgment creditor: and even against " him unless he consummates his title by a levy on the land under his " judgment. In that event, the prior levy is, as to him, void; and the " creditor loses all right under it. The case stands, in this respect, " precisely upon the same ground as any other defective levy, or sale. " The title to the land does not pass under it. *In short, a judmgent " creditor has no jus in re, but a mere power to make its general lien " effectual, by following up the steps of the law,* AND CONSUMMATING " HIS JUDGMENT BY AN EXECUTION AND LEVY UPON THE LAND. *If the " debtor should sell the estate, he has no right to follow the proceeds of " the sale into the hands of the vendor or vendee, or to claim the pur- " chase money in the hands of the latter.* It is not like the case where " the goods of a person have been tortiously taken and sold, and he " can trace the proceeds, and waiving the tort chooses to claim the " the latter. THE ONLY REMEDY OF THE JUDGMENT CREDITOR IS " AGAINST THE THING ITSELF, *by making that a specific title which was " before a general lien.* He can only claim the the proceeds of the " sale of the land, *when it has been sold on his own execution,* and " ought to be applied to its satisfaction."

See also Brace vs. Dutchess of Marlborough, 2 P. Wms., 491.

This is believed to be the best discussion of the nature of a judgment lien to be found in the American books, and certainly is clothed with the highest authority.

The lien of the judgment is a right to take the land in execution; nothing more; and where for any reason, whether from express legislative enactment, or the want of such enactment, or from the nature and character of the property, it can never be sold on execution, *the judgment is not a lien.*

Lowry, C. J., in Schaffer vs. Cadwallader, 26 Penn. St., 129, says:

" *It is essential to the existence of a lien* (as of all other legal rights) " *that it be recognized by law, by being enforced or protected as such.* " This is a very plain principle, and it refuses to a judgment against a " municipal corporation the character of a lien, BECAUSE SUCH A " JUDGMENT CANNOT BE EXECUTED AGAINST THE LAND.

See also Leedom v. Plymouth R. R., 5 W. & S. 265.
Massingill v. Downs, 7 How. 765.

B. It is understood to be settled that a railroad cannot be sold on an execution. Because it is certain that franchises cannot be, without express legislative sanction; and to authorize the sale of the property of a corporation, without its franchises, would simply ruin every body and benefit no one.

In Winchester T. Co. vs. Vimont, 5 B. Mon., 2, the Court in reversing a decree which directed the sale of *the road*, says:

"It can hardly be presumed that a sale of the *mere* road, what the "term in common parlance imports, was contemplated. It is true the "road, consisting of a narrow strip of ground, between Winchester and "Lexington, with a partial covering of rock upon it, belongs to the "company but only for particular uses and purposes. As to the land, "the company has merely a right of way over it, for the road, for its "construction and continuance. It can be used for no other purpose, "and when it shall cease to be so used, it will revert to the donors or "grantors thereof to the company. The purchaser therefore, would "acquire nothing, which he could render available and productive, unless "the corporate power of the company would follow or be included in "the sale of the road. But it is evident this would not be the case. "The power for the control and management of the road according to "the provisions of the charter, is vested in the owners of the stock, "which they exert through the officers whom they are authorized to ap-"point. *This power would not be acquired by the purchaser, as the stock "is not to be sold.* The acquisition of the purchaser, therefore, would not "*enrich him*, but would render the company *poor indeed.* The corpora-"tion would not only then be as corporations are said to be *without a "soul*, but it would thereby be without substance. *The inevitable ef-"fect of such a sale would be to destroy the road and the corporation. "It would be a useless, ruinous and unnecessary sacrifice of private in-"terest, and tend to the destruction of a cherished object of public in-"terest and convenience."*

See also Leedom v. Plymouth R. R. Co., 5 W. & S. 265.
Ammant v. President, &c., 13 Serg. & R. 210.
Susquehanna Canal v. Bonham, 9 W. & S. 27.
Seymour v. The Mitford, &c., 10 Ohio 480.
McLean J. Coe v. Hart, 6 Am. Law Reg. 41.
Ludlow v. Hurd, 6 Am. Law Reg. 502.
Tippetts v. Walker, 4 Mass. 596.
Redfield on Railways, 606.
Covington Bridge v. Shepherd, 21 *How.* 112.
Gue v. Tide Water Co., 24 *How.* 262.

Liens of judgments exist only by force of statutory provisions; and

are not to be extended by implication. Isaacs v. Swift, 10 Cal. 71.

In Douglas v. Huston, 6 Ohio 162, the court say:

"The existence, validity, and extent of a judgment lien in this State "are matters purely legal, dependent upon statutory provisions; *and* "*if the lien fails at law, it cannot be aided in equity.*"

See also *Buchan vs. Sumner*, 2 Barb., Ch. 195, and *Mower v. Kip*, 6 Paige 88, holding that the Court of Chancery will give effect to the lien of a judgment, *only so far as it could have been enforced at law.*

In Coombs v. Jordan, 3 Bland 298, the Chancellor says:

"This judgment lien is a uniform consequence of the real estate "being liable to be taken and extended under an execution issuing "upon such judgment. Wherever then such a liability exists, the "lien arises as the constant incident of such a judgment; *and where* "*the property cannot be taken in execution, there is no lien.* It will, "therefore, be sufficient in this, or any similar case, to shew the liability "of the real estate to be so taken in execution, to establish the exist-"ence of the lien."

See also Dosier vs. Lewis, 27 Miss., 679.
Corwin vs. Benham, 2 Ohio (N. S.) 36.

C. Judgments rendered in the federal courts owe their quality of being liens solely to State statutes.

Massingell v. Downs, 7 How., 760.
Williams v. Benedict, 8 How. 107.
Bank of Tennessee v. Horn, 17 How. 157.

Our statute, R. S. 1859, Ch. 102, sec. 5, provides: "All judgments "hereafter rendered in any court of record shall bind, and be a charge "upon lands, tenements, real estate and chattels real, in every county "where the record, &c.; "*and such estate and chattels real shall be* "*subject to be sold upon execution to be issued on such judgment.*"

The phraseology of this statute shows that it was not intended to include a railroad and franchises: it contains no term that can be construed to embrace franchises.

This is further manifest from the fact that the same statute (Ch. 54, sec. 11, &c.,) provides for the sale of the franchises and property of turnpike, plank-road and canal companies; companies "authorized to receive toll;" not in fee to the highest bidder for a certain sum, as real

estate and chattels real are to be sold under chapter 102, but for a term of years, by which the purchaser becomes authorized "to receive "during that time *all such toll as the said corporation would by law* be *entitled to demand.*"

The latter statute is conclusive of two things :

(1.) The Legislature did not understand chapter 102, section 5, as applying to the property and franchises of any corporation ; and

(2.) The Legislature did not intend to authorize the sale of railroads on execution, for they are not included in the latter statute upon a kindred subject.

The word *tolls* means not the sums collected by a company for the transportation of freight or passengers; but taxes paid for some liberty or privilege, "*particularly for the privilege of passing over a bridge, or on a highway,*" *&c.* Webster.

Some of the earlier railroad charters in this country contemplated the construction of a road, to be used by the public, paying toll for passage, as turnpikes as used ; and some of the earlier charter provide, as a separate grant, that the company may *also* transport passengers and property over its own road : thus providing for a joint use of the road by the company and the public.

But this railroad company (and the remark is belived to be true of all the later railroad charters, especially in Wisconsin,) was not authorized to build a road to be used by the public on payment of tolls. Its grant of power is to build a railroad; and to "transport, take and carry "property, and persons upon *said road* by the power and force of "steam," &c.

2. The Revised Statutes of Massachusetts (1836,) Ch. 44, provide as follows ;

"Sec. 12. When any judgment shall be recovered against any turn-"pike or other corporation *authorized to receive toll*, the franchises of such "corporation, with all the rights and privileges thereof, so far as relates "to the receiving of toll, and also all other corporate property, real "and personal, may be taken on execution or warrant of distress, and "sold by public auction."

"Sec. 13. The officer, to give notice of sale &c."

"Sec. 14. The officer may adjourn sale, &c."

"Sec. 15. In the sale of the franchise of any corporation, the per-"son, who shall satisfy the execution or warrant of distress, with all "legal fees and expenses thereon, *or who shall agree to take such fran-"chise* for the shortest period of time, *and to receive during that time*

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" *all such toll*, as the said corporation would by law be entitled to de-
" mand, shall be considered as the highest bidder.

" Sec. 16. "The officers return on such execution shall transfer to
" such purchaser all the privileges and immunities which by law be-
" longed to such corporation, *so far as relates to the right of de-*
" *manding toll;* and the officers shall, immediately after such sale, de-
" liver to the purchaser possession of all the *toll houses* and *gates*
" belonging to such corporation, in whatever county the same may be
" situated: *and the purchaser may thereupon demand and receive all*
" *the toll* which may accrue during the time limited by the terms of the
" purchase, in the same manner, and under the same regulations, as
" such corporation was before authorized to demand and receive the
" same."

" Section 17." Purchaser to have action for disturbance of franchise, &c.

Section 18. The corporation," to continue in all other respects clothed with same powers, bound to same duties, &c., as though no sale had taken place.

Section 19. Such corporation " may redeem, &c."

" Section 20. Whenever any damages have been, or may hereafter
" be assessed in favor of any person, either by an order of county commis-
" sioners, or by the verdict of a jury, for any injury sustained in his
" property, by the doings of any such turnpike, or other corporation
" *authorized to receive toll*, and the said damages shall remain unpaid,
" for the space of thirty days after such order or verdict, such person
" may have a warrant of distress against such corporation, for the
" damages assessed, together with the interest thereon, and his reason-
" able costs."

This statute provided for two cases:

(1.) The collection of judgments.

(2.) The collection of the value of lands taken, and other injuries occasioned to land owners by the location and construction of such public work, after the same had been assessed accordiug to law.

But the remedy given in both instances was confined to turnike *and other corporations authorized to receive toll*, and did not apply to railroads.

The Legislature of Massachusetts in 1847 (Chap. 259) made a similar provision as to RAILROADS, in case of unpaid assessments, as follows:

" Section 3. Whenever damages shall have been assessed against any
" railroad corporation, upon the petition of any person injured by the
" location and construction of their road, by the county commissioners,
" or the verdict of a jury, said commissioners may issue warrants of

" distress to compel the payment of such damages, together with costs " and lawful interest: *provided* that no such warrant shall issue till " after the expiration of the time allowed by law for filing a petition " for a jury."

In Massachusetts after the assessment of damages in favor of land owner, an appeal may be taken to the common pleas, where a jury assess the damages. These proceedings may be reviewed by the Supreme Court on bill of exceptions; but when the amount is ascertained, it is certified by the Supreme Court to the commissioners, and they issue distress warrant under this statute.

Com. v. Boston & M. R. R. Co., 3 Cush. 57.

In our revision of 1849, sections 12, 13, 14, 15, 16, 17, 18 and 19, of the Massachusetts Revised Statutes are substantially adopted, and are sections 11, 12, 13, 14, 15, 16, 17 and 18, of our Chapter 54.

But the Legislature wishing to adopt the amendment made in Mass., before cited, passed the 20th section of the Massachusetts Revised Statutes, the 19th of ours, as follows:

" Section 19. Whenever any damages may have been or may here- " after be assessed, in favor of any person, for injury sustained in his " property by the doings of any such turnpike, or other corporation " authorized to receive toll, OR PAY FOR THE TRANSPORTATION OF PER- " SONS AND PROPERTY, and the said damages shall remain unpaid for " the space of thirty days after such assessment, such person may have " a warrant of distress against such corporation for the damages " assessed, &c."

The Legislature of Wisconsin, wishing to give a remedy by warrant of distress for unpaid damages assessed, as well against railroad companies, as turnpike and other corporations authorized to receive toll, as had been done by the act of 1847 in Massachusetts, to accomplish their purpose, after the words " turnpike or other corporation authorized to receive toll" in the original section, added the words "OR PAY FOR THE TRANSPORTATION OF PERSONS AND PROPERTY," not found in the original section.

This is conclusive to show that the mind of the legislature was directed to this precise point: and from the fact that in the case where they wished to include railroads they employed for that purpose words not found in the parent statute, the conclusion is irresistable that in the provisions in relation to judgments the Legislature of Wisconsin

did not design to include railroads, because they adhered to the precise language of the parent sections in that behalf. Had it been the purpose of our Legislature to permit railroads as well as turnpikes to be sold on execution, the same words which were inserted in section 19 would also have been inserted in the sections relating to judgments.

3. The same Revised Statutes of Wisconsin made the following general provisions for collecting judgments against all corporations:

Chap. 114, "Sec. 6. Whenever a judgment at law, or decree in "chancery, shall be obtained against ANY corporation, incorporated "under the laws of this State, and an execution issued thereon shall "have been returned unsatisfied in whole or in part, upon the petition "of the person obtaining such judgment or decree, or his representa "tives, the Circuit Court within the proper county may sequestrate "the stock, property, things in action, and effects of such corporation, "and may appoint a receiver of the same.

"Sec. 7. Upon a final decree upon any such petition, the court shall "cause a just and fair distribution of the property of such corporation, "and of the proceeds thereof, *to be made among the fair and honest "creditors of such corporation, in proportion to their debts respectively*, "who shall be paid in the same order as provided in the case of a vol- "untary dissolution of a corporation."

Gelpcke vs. The Horicon Railroad, reported, on collateral questions, 11 *Wis.* 455, was a proceeding under this statute.

The order of sequestration in the Court below, recited that Gelpcke a judgment creditor, whose execution had been returned unsatisfied, had presented to said "Court, a petition, in the form of a complaint against the defendant the Milwaukee and Horicon Railroad Company" setting forth &c., and proceeded, "and the Court having duly considered the same, the Court does here order, adjudge and decree in "pursuance of Chapter 148 of the Revised Statutes of this State" (being the R. S. 1858, the same as Chapter 114 R. S., 1849, before cited) "that the stock, property real and personal things in action and effects of said corporation of whatever name, nature and description, be and the same are hereby sequestrated for the benefit of *all the creditors of said corporation*" and appointed a Receiver of the property, franchises, revenues, &c., of the company, with authority to operate the road &c.

This is cited to show that this statute is regarded by our State Courts as furnishing the proper remedy against railroad companies.

This statute gives no preferences, not even in favor of the judgment upon which the sequestrating proceeding is instituted. The final decree is to distribute the property of the corporation among all the fair and honest creditors of the corporation, not in the order of the dates of their judgments, but "*in proportion to their debts respectively.*"

In connection with the provision before quoted from other chapters of one statute, the effect is to give the creditor of a *railroad* company exactly the remedies enjoyed in *Pennsylvania*, against *all corporations*. After the decision in Ammant vs. The Prest· &c., 13 S. & R. 210, in which the Court held that the road could not be sold, and where the Chief Justice suggested that the Legislature ought to provide a remedy by sequestration, the following statute was enacted.

Act of June 1 , 1836.

"LXXII. All executions which shall be issued from any Court of "Record, against any corporation, not being a County, Township or "public corporate body, shall command the sheriff or other officer to "levy the sum recovered, together with the costs of suit, of the goods "and chattels, lands and tenements of such corporations, and such exe- "cution shall be executed in the manner following, to-wit :

"1. The officer charged with the execution of such writ, shall go to "the banking houses or other principal office of such corporation, dur- "ing the usual office hours, and demand of the president, or other chief "officer, cashier, treasurer, secretary, chief clerk or other officer, hav- "ing charge of such office, the amount of such execution, with legal "costs.

"2. If no person can be found, on whom demand can be made, as "aforesaid, or if the amount of said execution be not forthwith paid, "in lawful money, after demand, as aforesaid, such officer shall seize "personal property of said corporation, sufficient to satisfy the debt, "interest and cost, as aforesaid.

"3. If the corporation against which such execution shall be issued, "be a banking company, and other sufficient personal property cannot "be found, such officer shall take so much of any current coin, of gold, "silver or copper which he may find, as shall be sufficient to satisfy the "debt, interest and cost, as aforesaid.

"4. If no sufficient personal property be found as aforesaid, such "officers shall levy such execution upon the real estate of such cor- "poration, and thereupon, proceed in the manner provided in other "cases, for the sale of land upon execution.

"LXXIII. In every case in which judgment shall have been obtained "against such corporation, except as aforesaid, and an execution is- "sued thereon, shall have returned, unsatisfied, in part or in whole, it "shall be lawful for the Court in which such judgment shall have been

" obtained, upon the bill or petition of the plaintiff in such judgment, " to award a writ to sequester the goods, chattels and credits, rents, " issues and profits, tolls and receipts from *any road*, canal, bridge or " *other work*, property or estate of such corporation.

LXXIV. The Court shall upon the awarding of any such writ, ap- " point a sequestrater to execute the same, and to take charge of the " property and funds, take or received by virtue of such writ, and to " distribute the nett proceeds thereof *among all the creditors of such* " *corporation*, according to the rules established in the case of the in- " insolvency of individuals, and such sequestrater shall have all the ' powers and be subject to all the duties of Masters appointed under " the law relating to insolvent debtors, &c.

Under this statute, the Court in Susquehanna Canal Co. vs. Bonham, 9 W. & S., 27, held that the creditor could not levy upon any land used in connection with the road, as for toll houses and gates. The Court say:

" The remedy for creditors in such case by sequestration was sug- " gested in the opinion of Chief Justice Tilghman, (13 Serg. & Rawl. " 310.) and has since been carried into effect by the provisions of the " act of 16th June, 1836, and it gives to the creditor all the redress " the Legislature thought he could have against the property necessary " to the company, consistent with the preservation of the public inter- " ests."

See also Redfield on Railways, 606.

Mann vs. Pentz, 3 Comstock, 415.

Leedon vs. the Plymouth R. R. Co., 5 W. & S., 265, was a case of sequestration under this Statute, where Leedon, the plaintiff, a judgment creditor who had instituted the proceedings, claimed priority in favor of his judgment. The Court say:

" The plaintiff could claim a priority out of the tolls collected, only " on the ground that his judgment gave him a lien upon them. To " have this effect he must make out that these tolls were such an interest " in land existing in the corporation, at the time when the judgment " was rendered, as to be bound by it. The road itself could not be " taken in execution; Ammont vs. The Pres't, &c., 13 S. & R., 210; " AND FOR THE SAME REASON IS NOT BOUND BY A JUDGMENT; much " less is the right of taking tolls from the passengers and freighters, " which is a corporate franchise, a species of incorporeal hereditament " incident to the road. 2 Black. Com. 38. These tolls were all col- " lected after the judgment rendered and after the appointment of the " sequestrator. The effect of the 74 Sec. of the act of 16 June, 1836,

relating to executions which adopts the provisions of the 27 Section of the act of 16 June, 1836, relating to insolvent debtors, is merely to save the judgment, mortgage and execution creditors their liens existing at the time of the sequestration. *The plaintiff has none such here* to receive the protection of the act.

D. Independent of statutory provisions, the only remedy of a judgment creditor is to exhibit his bill in equity, and thus and thereby create an equitable lien upon the revenues of the road—*Corington Bridge v. Shepherd*, 21 *How.* 112. But where there is a statute, like the one last above quoted, providing a remedy by sequestration, it is submitted that such remedy is exclusive of all others. However this may be, it is certain that in regard to the Cleveland judgment now under consideration, *no proceedings whatever*, either under the statute or in equity, had fixed a lien upon the revenues of the debtor company; and in 1859, on the foreclosure of the Barnes mortgage, the property passed to the Milwaukee and Minnesota Company—*Bronson v. R. R.*, 2 *Wallace* 304; and it is now too late for any proceedings whatever to make that judgment a lien.

VIII.

If the court shall hold that judgments at law are not liens upon railroads, as I have claimed under the last point, then this bill will fail so far as regards the cancellation of the Cleveland judgment, because if that judgment is not a lien, the Milwaukee and Minnesota Company has no interest in having it cancelled.

But in that event, the bill must be sustained for the purpose of enforcing an accounting as to the revenues received by Chamberlain after the foreclosure of the Barnes mortgage, and the vesting of the property in the Minnesota Company.

Chamberlain was in possession under a lease fraudulent and void as to creditors, and which had been set aside and annulled by decree of court, at the time of the Barnes foreclosure. By that foreclosure the property became vested in the Minnesota Company, which is entitled to recover from Chamberlain all nett revenues subsequently received by him; and the necessity for an accounting to ascertain the amount gives a court of equity jurisdiction of the case made by this bill for that purpose.

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